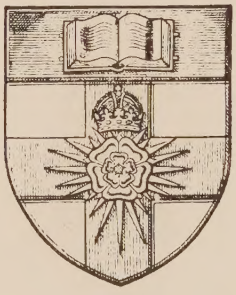
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

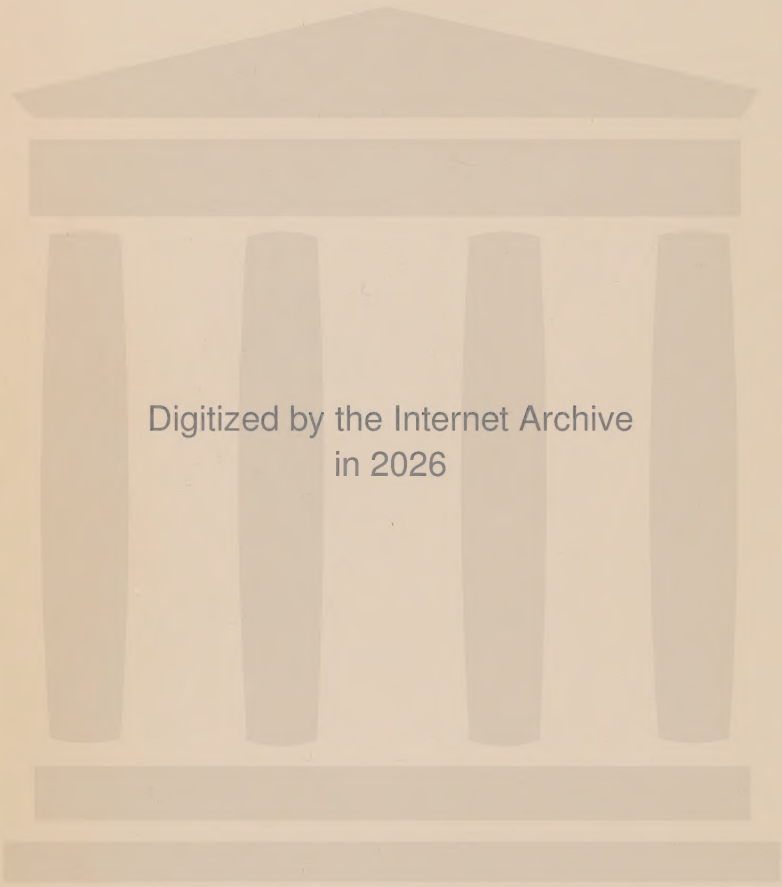
UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

346.4
Mx. North Gallery



UNIVERSITY OF LONDON
LIBRARY


Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-appeal-cases_1909

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir F. A. Bosanquet, K.C.
Vice-Chairman—Robert F. Norton, Esq., K.C.

EX-OFFICIO MEMBERS.

Sir William S. Robson, M.P. . . Attorney-General.
Sir Samuel T. Evans, M.P. . . . Solicitor-General.
William H. Winterbotham, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. J. Eldon Bankes, Esq., K.C.	Inner Temple.
J. M. Astbury, Esq., K.C., M.P. C. C. Scott, Esq.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
Sir John Hollams (Firm—Messrs. Hollams, Sons, Coward & Hawksley). W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1909.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

House of Lords—English and Irish Appeals and Peerage Cases	J. M. MOORSOM, K.C.	
House of Lords—Scottish and Divorce Appeals and Scottish Peerage Cases . . .	GERALD J. WHEELER,	*Barrister-at-law.*
Privy Council Appeals (including Appeals from Ecclesiastical Courts)	HERBERT COWELL,	*Barrister-at-law.*

1909.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

JUDGES, LAW OFFICERS, AND CHAIRMAN OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

MEMORANDA.

1908

Dec. 12. Sir Cornelius Marshall Warmington, Bart., K.C., *Chairman of the Incorporated Council of Law Reporting for England and Wales since the 20th of November*, 1900, *died at his residence*, 9, *Pembridge Square, W., at the age of* 66.

1909

Jan. 27. The Right Honourable Sir John Edge, *formerly Chief Justice of the High Court of the Western Provinces, India, was appointed a member of the Judicial Committee of the Privy Council under s.* 2 *of the Appellate Jurisdiction Act*, 1908.

Feb. 2. The Right Honourable Lord Robertson *died suddenly at Cap Martin, France, at the age of* 63.

Feb. 10. The Honourable Mr. Justice Bigham *was appointed President of the Probate, Divorce, and Admiralty Division of the High Court of Justice in the room of* The Right Honourable Sir John Gorell Barnes, *who resigned his office.* Mr. Justice Bigham *was afterwards sworn of the Privy Council, and took his seat at the Board accordingly.*

Feb. 10. John Andrew Hamilton, Esq., K.C., *was appointed one of the Justices of the High Court of Justice in the room of* Mr. Justice Bigham, *and was afterwards knighted.*

Feb. 16. The Right Honourable Sir John Gorell Barnes, *late President of the Probate, Divorce, and Admiralty Division, was created a Baron of the United Kingdom by the name of* Baron Gorell, *of Brampton in the county of Derby.*

Feb. 20. The Right Honourable Thomas Shaw, K.C., M.P., *Lord Advocate for Scotland, was appointed a Lord of Appeal in the room of* Lord Robertson.

November 30. The Right Honourable Syed Ameer Ali, C.I.E., *was appointed a member of the Judicial Committee of the Privy Council in the place of* Sir Andrew Scoble, *who had resigned his office.*

ERRATA.

Page.	*Line.*	*For*	*Read*
58	16 from bottom	*R.* v. *Whitechapel*	*Rex* v. *Poor Law Commissioners for England and Wales.*
70	5 ,,	them also	themselves.
150	footnote (2)	L. R. 1 Sc. & D.	L. R. 1 H. L. Sc.
339	,, (3)	[1896] A. C. pp. 290, 224	[1896] A. C. pp. 290, 294.
346	12 from bottom	*Carpmael*	*Austen-Cartmell.*
528	footnote (1)	L. R. 1 Sc. & D.	L. R. 1 H. L. Sc.
551	12 from bottom	*F. E. Simon, K.C.*	*J. A. Simon, K.C.*
601	footnote (2)	8 Maritime L. C.	8 Asp. M. L. C.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1909, will be as follows :—

In the First Series,
[1909] 1 Ch. [1909] 2 Ch.

In the Second Series,
[1909] 1 K. B. [1909] 2 K. B. [1909] P.

In the Third Series,
[1909] A. C.

The Scottish Law Reports are cited as follows :—

Shaw, or, First Series Court of Session Cases	.	.	by	S.
Dunlop, or, Second Series	,,	,,	,,	.	.	,,	D.
Macpherson, or, Third Series	,,	,,	,,	.	.	,,	M.
Rettie, or, Fourth Series	,,	,,	,,	.	.	,,	R.
Fraser, or, Fifth Series	,,	,,	,,	.	.	,,	F.
New Series	,,	,,	,,	.	.	,,	1907 S. C.
Scottish Law Reporter	,,	,,	,,	.	.	,,	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	.	,,	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.	PAGE
Accident (General), Fire and Life Assurance Corporation *v.* Robertson – – H. L. (Sc.)	404
Addis *v.* Gramophone Company, Ld. – – – H. L. (E.)	488
Anslow *v.* Cannock Chase Colliery Company – H. L. (E.)	435
Armstrong, James Bay Railway Company *v.* – – P. C.	624
Assurance (General Accident, Fire and Life) Corporation *v.* Robertson – – H. L. (Sc.)	404
Atkinson, General Billposting Company *v.* – H. L. (E.)	118
Attorney-General, Great Northern, Piccadilly and Brompton Railway Company *v.* H. L. (E.)	1

PAGE

Attorney-General, London and India Docks Company *v.* H. L. (E.) 7
——————— *v.* Richmond and Gordon (Duke) H. L. (E.) 466
Attorney-General for New South Wales *v.* Collector of Customs for New South Wales – P. C. 345
Attorney-General for Queensland *v.* Brisbane City Council P. C. 582

B.

Badar Bee *v.* Habib Merican Noordin – – – P. C. 615
Banbury Union, Great Central Railway Company *v.* H. L. (E.) 78
Billposting (General) Company, Atkinson *v.* – H. L. (E.) 118
Blackpool and Fleetwood Tramroad Company, Thornton Urban Council *v.* – – H. L. (E.) 264
Blakiston *v.* Cooper H. L. (E.) 104
Blue & Deschamps *v.* Red Mountain Railway Company P. C. 361
Bolton, Gough *v.* – H. L. (I.) 64
Booth, Sprague *v.* – – P. C. 576
Bow, McLachlan & Co., Ld. *v.* Camosun (Ship) – – P. C. 597
Brisbane City Council, Attorney-General for Queensland *v.* P. C. 582
British India Steam Navigation Company, Chartered Bank of India, Australia and China *v.* P. C. 369
Brook *v.* Meltham Urban Council H. L. (E.) 438
Bruhn *v.* Rex – – P. C. 317
Brunet, United Shoe Machinery Company of Canada *v.* – P. C. 330
Buchan (Earl) *v.* Lord Advocate H. L. (Sc.) 166
Butterworth *v.* West Riding of Yorkshire Rivers Board H. L. (E.) 45

C.

PAGE

Cadeby (Denaby and) Main Collieries, Ld., Denaby Parish Overseers *v.* – H. L. (E.) 247
Caledonian Railway Company *v.* Glasgow Corporation H. L. (Sc.) 138
Camosun (Ship), Bow, McLachlan & Co., Ld. *v.* – – P. C. 597
Canada (Grand Trunk Railway Company of) *v.* Robertson P. C. 325
Canada (United Shoe Machinery Company of) *v.* Brunet – P. C. 330
Cannock Chase Colliery Company, Anslow *v.* – – H. L. (E.) 435
Capetown Board of Executors, Stephan *v.* – – – P. C. 347
Chang Hang Kiu *v.* Piggott. *In re* Lai Hing Firm – P. C. 312
Chartered Bank of India, Australia and China *v.* British India Steam Navigation Company – – – P. C. 369
Chippendall *v.* William Laidley & Co., Ld. – – – P. C. 199
Cochrane & Co., Roger *v.* H. L. (Sc.) 285
Collector of Customs for New South Wales, Attorney-General for New South Wales *v.* – P. C. 345
Collieries (United), Ld. *v.* Simpson – – – H. L. (Sc.) 383
Colliery (Cannock Chase) Company, Anslow *v.* – H. L. (E.) 435
Colliery (Orrell) Company *v.* Schofield – – H. L. (E.) 433
Collins, Dominion Natural Gas Company *v.* – – P. C. 640
Continental Heat and Light Company, La Compagnie Hydraulique de St. François *v.* P. C. 194
Conway *v.* Wade – H. L. (E.) 506
Cooke *v.* Midland Great Western Railway of Ireland H. L. (I.) 229
Cooper, Blakiston *v.* H. L. (E.) 104
Corea *v.* Peiris – – P. C. 549
Curator of Intestate Estates, Williams *v.* – – P. C. 353

D.

PAGE

Deichler, Murphy *v.* H. L. (I.) 446
Denaby and Cadeby Main Collieries, Ld., Denaby Parish Overseers *v.* – H. L. (E.) 247
Denaby Parish Overseers *v.* Denaby and Cadeby Main Collieries, Ld. – H. L. (E.) 247
De Silva, Rabot *v.* – – P. C. 376
Dewar *v.* Goodman– H. L. (E.) 72
Docks (London and India) Company *v.* Attorney-General H. L. (E.) 7

v. McDougall & Bonthron, Ld. H. L. (E.) 25

v. Page, Son & East, Ld. H. L. (E.) 25

v. Thames Steam Tug and Lighterage Company H. L. (E.) 15
Dominion Coal Company *v.* Dominion Iron and Steel Company – – – P. C. 293
Dominion Iron and Steel Company, Dominion Coal Company *v.* – – – – P. C. 293
Dominion Natural Gas Company *v.* Collins – – P. C. 640
Dublin and South-Eastern Railway Company, S. Pearson & Son, Ld. *v.* – H. L. (I.) 217
Dyson *v.* Forster – H. L. (E.) 98
——— *v.* Seed – H. L. (E.) 98

E.

Edwards *v.* Edwards H. L. (E.) 275

F.

Fire and Life (General Accident) Assurance Corporation *v.* Robertson – H. L. (Sc.) 404
Fishing (General Steam) Company, Low *v.* – H. L. (Sc.) 523
Fleetwood (Blackpool and) Tramroad Company, Thornton Urban Council *v.* H. L. (E.) 264

PAGE

Forrest *v.* Merry & Cuninghame, Ld. – – H. L. (Sc.) 417
Forster, Dyson *v.* – H. L. (E.) 98
Fulford *v.* Hardy – – P. C. 570

G.

General Accident, Fire and Life Assurance Corporation *v.* Robertson – H. L. (Sc.) 404
General Billposting Company *v.* Atkinson– – H. L. (E.) 118
General Steam Fishing Company, Low *v.* – – H. L. (Sc.) 523
George *v.* Glasgow Coal Company H. L. (Sc.) 123
Gillespie *v.* Riddell – H. L. (Sc.) 130
Gingell, Son & Foskett, Ld., Stepney Corporation *v.* H. L. (E.) 245
Glasgow Coal Company, George *v.* – – – H. L. (Sc.) 123
Glasgow Corporation, Caledonian Railway Company *v.* H. L. (Sc.) 138
Goodman, Dewar *v.* H. L. (E.) 72
Gough *v.* Bolton – H. L. (I.) 64
———, Rowe *v.* – H. L. (I.) 64
Gramophone Company, Ld., Addis *v.* – – H. L. (E.) 488
Grand Trunk Railway Company of Canada *v.* Robertson P. C. 325
Great Central Railway Company *v.* Banbury Union H. L. (E.) 78

Sheffield Union *v.* H. L. (E.) 78
Great Eastern Railway Company *v.* Lord's Trustee – H. L. (E.) 109
Great Northern, Piccadilly and Brompton Railway Company *v.* Attorney-General– H. L. (E.) 1
Great Western Railway Company, Midland Railway Company *v.* – – H. L. (E.) 445
Great Western Railway Company, Reed *v.* – H. L. (E.) 31
Green *v.* Newport Union H. L. (E.) 35
Guthrie, Low *v.* – H. L. (Sc.) 278

H.

PAGE

H.M.'s Consul-General at Shanghai, Maori King (Owners of S.S.) *v.* – – – P. C. 562
Habib Merican Noordin, Badar Bee *v.* – – – P. C. 615
Hardy, Fulford *v.* – – P. C. 570
Heat and Light (Continental) Company, La Compagnie Hydraulique de St. François *v.* P. C. 194
Hordern *v.* Hordern – P. C. 210

I.

India (London and) Docks Company *v.* Attorney-General H. L. (E.) 7

v. McDougall & Bonthron, Ld. – – H. L. (E.) 25

v. Page, Son & East, Ld. H. L. (E.) 25

v. Thames Steam Tug and Lighterage Company H. L. (E.) 15
Inland Revenue *v.* Oliver H. L. (Sc.) 427
Ireland (Midland Great Western Railway of), Cooke *v.* H. L. (I.) 229
Iron and Steel (Dominion) Company, Dominion Coal Company *v.* – – – P. C. 293

J.

James Bay Railway Company *v.* Armstrong– – – P. C. 624

K.

Kettlewell, Refuge Assurance Company *v.* – H. L. (E.) 243

L.

La Compagnie Hydraulique de St. François *v.* Continental Heat and Light Company P. C. 194

PAGE

Lai Hing Firm, In re. Chang Hang Kiu *v.* Piggott – P. C. 312
Laidley (William) & Co., Ld., Chippendall *v.* – – P. C. 199
Local Government Board *v.* South Stoneham Union H. L. (E.) 57
London and India Docks Company *v.* Attorney-General H. L. (E.) 7

v. McDougall & Bonthron, Ld. – – – H. L. (E.) 25

v. Page, Son and East, Ld. H. L. (E.) 25

v. Thames Steam Tug and Lighterage Company H. L. (E.) 15
Lord Advocate, Buchan (Earl) *v.* H. L. (Sc.) 166
Lord's Trustee, Great Eastern Railway Company *v.* H. L. (E.) 109
Low *v.* General Steam Fishing Company – – H. L. (Sc.) 523
—— *v.* Guthrie – H. L. (Sc.) 278
Lyle & Sons *v.* Schwan (Owners of S.S.) – – H. L. (E.) 450

M.

McDougall & Bonthron, Ld., London and India Docks Company *v.* – H. L. (E.) 25
Maori King (Owners of S.S.) *v.* H.M.'s Consul-General at Shanghai – – – P. C. 562
Meltham Urban Council, Brook *v.* H. L. (E.) 438
Merry & Cuninghame, Ld., Forrest *v.* – – H. L. (Sc.) 417
Midland Great Western Railway of Ireland, Cooke *v.* H. L. (I.) 229
Midland Railway Company *v.* Great Western Railway Company – – H. L. (E.) 445
—— *v.* Myers, Rose & Co., Ld. H. L. (E.) 31

PAGE

Minister of Stamps *v.* Townend P. C. 633
Murphy *v.* Deichler– H. L. (I.) 446
Myers, Rose & Co., Ld., Midland Railway Company *v.* H. L. (E.) 13

N.

Nairn *v.* St. Andrews University H. L. (Sc.) 147
National Telephone Company, Postmaster General *v.* H. L. (E.) 269
Newport Union, Green *v.* H. L. (E.) 35
————————, Stead *v.* H. L. (E.) 35

O.

Oliver, Inland Revenue *v.* H. L. (Sc.) 427
Orrell Colliery Company *v.* Schofield – – – H. L. (E.) 433

P.

Page, Son & East, Ld., London and India Docks Company *v.* H. L. (E.) 25
Pearson (S.) & Son, Ld. *v.* Dublin and South Eastern Railway Company H. L. (I.) 217
Peiris, Corea *v.* – – P. C. 549
Piggott, Chang Hang Kiu *v.* *In re* Lai Hing Firm – P. C. 312
Postmaster-General *v.* National Telephone Company H. L. (E.) 269

Q.

Quin & Axtens, Ld. *v.* Salmon H. L. (E.) 442

R.

Rabot *v.* De Silva – – P. C. 376
Red Mountain Railway Company, Blue & Deschamps *v.* – P. C. 361

PAGE

Reed *v.* Great Western Railway Company – – H. L. (E.) 31
Refuge Assurance Company *v.* Kettlewell – – H. L. (E.) 243
Rex, Bruhn *v.* – – P. C. 317
Rhondda Urban Council *v.* Taff Vale Railway Company H. L. (E.) 253
Richmond & Gordon (Duke), Attorney-General *v.* H. L. (E.) 466
Riddell, Gillespie *v.*– H. L. (Sc.) 130
Robertson, General Accident, Fire and Life Assurance Corporation *v.* – H. L. (Sc.) 404
————, Grand Trunk Railway Company of Canada *v.* P. C. 325
Roger *v.* Cochrane & Co. H. L. (Sc.) 285
Rowe *v.* Gough – H. L. (I.) 64

S.

S. Pearson & Son, Ld. *v.* Dublin and South Eastern Railway Company – – H. L. (I.) 217
St. Andrews University, Nairn *v.* – – – H. L. (Sc.) 147
St. François (La Compagnie Hydraulique de) *v.* Continental Heat and Light Company P. C. 194
Salmon, Quin & Axtens, Ld. *v.* H. L. (E.) 442
Schofield, Orrell Colliery Company *v.* – – H. L. (E.) 433
Schwan (Owners of S.S.), Lyle & Sons *v.* – – H. L. (E.) 450
Seed, Dyson *v.* – H. L. (E.) 98
Sheffield Union *v.* Great Central Railway Company H. L. (E.) 78
Shoe (United) Machinery Company of Canada *v.* Brunet P. C. 330
Simpson, United Collieries, Ld. *v.* – – – H. L. (Sc.) 383
South Stoneham Union, Local Government Board *v.* H. L. (E.) 57

	PAGE
Sprague *v.* Booth – – P. C.	576
Stead *v.* Newport Union H. L. (E.)	35
Steam Navigation (British India) Company, Chartered Bank of India, Australia and China *v.* P. C.	369
Steam Tug and Lighterage Company (Thames), London and India Docks Company *v.* H. L. (E.)	15
Stephan *v.* Capetown Board of Executors – – – P. C.	347
Stepney Corporation *v.* Gingell, Son & Foskett, Ld. H. L. (E.)	245

T.

Taff Vale Railway Company, Rhondda Urban Council *v.* H. L. (E.)	253
Telephone (National) Company, Postmaster-General *v.* H. L. (E.)	269
Thames Steam Tug and Lighterage Company, London and India Docks Company *v.* H. L. (E.)	15
Thornton Urban Council *v.* Blackpool and Fleetwood Tramroad Company H. L. (E.)	264
Townend, Minister of Stamps *v.* P. C.	633
Tramroad (Blackpool and Fleetwood) Company, Thornton Urban Council *v.* – H. L. (E.)	264

U.

United Collieries, Ld. *v.* Simpson H. L. (Sc.)	383
United Shoe Machinery Company of Canada *v.* Brunet P. C.	330

W.

Wade, Conway *v.* – H. L. (E.)	506
West Riding of Yorkshire Rivers Board, Butterworth *v.* H. L. (E.)	45
William Laidley & Co., Ld., Chippendall *v.* – – P. C.	199
Williams *v.* Curator of Intestate Estates – – – P. C.	353

Y.

Yorkshire (West Riding) Rivers Board, Butterworth *v.* H. L. (E.)	45

TABLE OF CASES CITED.

A.

		PAGE
Aaron's Reefs *v.* Twiss	[1896] A. C. 273	339
Abbott *v.* Macfie	2 H. & C. 744; 33 L. J. (Ex.) 177	231
——— *v.* Minister for Lands	[1895] A. C. 425	202
Alexander, In the Goods of	29 L. J. (P. & M.) 93	448
——— *v.* Newman	2 C. B. 122	467
Alison's Case	L. R. 9 Ch. 1	618
Allan Brothers *v.* James Brothers	3 Com. Cas. 10	372
Allen *v.* Flood	[1898] A. C. 1	508
Annandale, The	2 P. D. 179	564
Arbuthnot *v.* Colquhoun	Mor. Dict. 10424	134
Archambault *v.* Archambault	[1902] A. C. 575	627
Aspdin *v.* Austin	5 Q. B. 671	299
Atlantic and North-West Railway Company *v.* Wood	[1895] A. C. 257	627
Attorney-General *v.* Antrobus	[1905] 2 Ch. 188	233
——— *v.* Beech	[1898] 2 Q. B. 147	468
——— *v.* Edison Telephone Company of London	6 Q. B. D. 244	270
——— *v.* Regent's Canal and Dock Company	[1904] 1 K. B. 263	11
——— *v.* Worrall	[1895] 1 Q. B. 99	637
Auld *v.* Shairp	2 R. 191	395
Automatic Self-Cleansing Filter Syndicate Company *v.* Cuninghame	[1906] 2 Ch. 34	443

B.

Bailey *v.* Kenworthy	[1908] 1 K. B. 441	436
Bain *v.* Fothergill	L. R. 7 H. L. 158	495
Baldwin, In re	12 N. S. W. L. R. 128	202
Bally *v.* Wells	3 Wils. 25	73
Bank of England, Ex parte	[1895] 1 Ch. 37	618
Barnes *v.* Vincent	5 Moo. P. C. 201	447
Barraclough *v.* Greenhough	L. R. 2 Q. B. 612	318
Barrington *v.* City of Montreal	25 Sup. Ct. Can. 202	628
Barrs *v.* Jackson	1 Y. & C. 585; 1 Ph. 582	618
Barry *v.* Butlin	2 Moo. P. C. 480	281
Basten *v.* Butter	7 East, 479	611
Baxter's Leather Company *v.* Royal Mail Steam Packet Company	[1908] 2 K. B. 626	372
Beauchamp (Earl) *v.* Madresfield	L. R. 8 C. P. 245	154
Bell *v.* Midland Railway Company	10 C. B. (N.S.) 287	500
Benson *v.* Lancashire and Yorkshire Railway Company	[1904] 1 K. B. 242	32

		PAGE
Benwell Tower, The	8 Asp. M. L. C. 13	601
Beresford-Hope *v.* Sandhurst (Lady)	23 Q. B. D. 79	154
Bigge *v.* Parkinson	7 H. & N. 955	296
Binks *v.* South Yorkshire Railway Company	3 B. & S. 244	232
Bird *v.* Holbrook	4 Bing. 628	232
Birely *v.* Toronto, Hamilton, and Buffalo Railway Company	25 Ont. App. Rep. 88	627
Birmingham Canal Company *v.* Cartwright	11 Ch. D. 421	276
Bishop *v.* North	11 M. & W. 418; 12 L. J. (Ex.) 362	266
Bist *v.* London and South Western Railway Company	[1907] A. C. 209	126, 529
Blackett v. Bates	L. R. 1 Ch. 117	299
Blackwood *v.* London Chartered Bank of Australia	L. R. 5 P. C. 92	202
Blount *v.* Layard	[1891] 2 Ch. 691	233
Blyth Harbour Commissioners *v.* Newsham Churchwardens	[1894] 2 Q. B. 293, 675	38
Boone *v.* Eyre	1 H. Bl. 273, n.	119
Boston Deep Sea Fishing and Ice Company *v.* Ansell	39 Ch. D. 339	119
Bracegirdle *v.* Orford	2 M. & S. 77	501
Branden	9 Scots L. Times, 380	180
Breadalbane *v.* Jamieson	4 R. 667	135
Brighton Guardians *v.* Strand Union	[1891] 2 Q. B. 156	151
Brintons *v.* Turvey	[1905] A. C. 230	32
Bristol (Marquis) *v.* Beck	23 Times L. R. 224	154
British United Shoe Machinery Company *v.* Somervell Brothers	95 L. T. 711	334
Broom *v.* Davis	7 East, 479	611
Brown *v.* Edgington	2 Man. & G. 279	296
——— *v.* Ingram	7 M. 281	155
——— *v.* Macgregor	15 S. 837; 3 S. & M. App. 84	174
Bullivant *v.* Attorney-General for Victoria	[1901] A. C. 196	468, 637
Burgess *v.* Morton	[1896] A. C. 136	528
Burke *v.* Grand Trunk Railway Company	6 Upp. Can. Rep. C. P. 486	627
Burrows *v.* March Gas and Coke Company	L. R. 7 Ex. 96	642
Buxton v. Lister	3 Atk. 383	299

C.

Cadell *v.* Allan	7 F. 606	172
Callaghan *v.* Maxwell	2 F. 420	32
Campbell, In re	[1902] 1 K. B. 113	430
Canada Southern Railway and Norvall, In re	41 Upp. Can. Rep. Q. B. 195	627
Canadian Pacific Railway Company *v.* Blain	[1904] A. C. 453	627
Capel *v.* Child	2 C. & J. 558	313
Cathcart, The	L. R. 1 A. & E. 314	601
Chambers, In re	13 N. Z. L. R. 111	637
Chanter *v.* Hopkins	4 M. & W. 399	297

		PAGE
Chapman *v.* Great Western Railway Company	5 Q. B. D. 278	372
——— *v.* Smith	[1907] 2 Ch. 97	74
Charlesworth *v.* Mills	[1892] A. C. 231	111
Cheapside, The	[1904] P. 339	600
Chisholm *v.* Macauley	7 Sup. Ct. Rep. N. S. W. 312	202
Chorlton *v.* Kessler	L. R. 4 C. P. 397	154
——— *v.* Lings	L. R. 4 C. P. 374	151
Christiana *v.* Andiappa Pulle	1 Balasingham, 58	551
Citizens' Insurance Company *v.* Parsons	7 App. Cas. 96	196
Clark *v.* Chambers	3 Q. B. D. 327	230
Clegg *v.* Hands	44 Ch. D. 503	74
Cleland *v.* Cleland	1 D. 254	283
Clergue, Ex parte	[1903] A. C. 521	627
Clift, In re	16 N. S. W. L. R. 155	202
Clough *v.* London and North Western Railway Company	L. R. 7 Ex. 26	339
Colonial Building, &c., Association *v.* Attorney-General of Quebec	9 App. Cas. 157	196
Combe's (Abbot of) Case	Year Book, Edw. 3, 43 Ass. pl. 37	256
Commissioner of Trade and Customs *v.* Bell	[1902] A. C. 563	319
Concha *v.* Concha	11 App. Cas. 541	618
Congleton Corporation *v.* Pattison	10 East, 130	74
Cooper and Allen's Contract, In re	4 Ch. D. 802	185
Cooper *v.* Wandsworth Board of Works	14 C. B. (N.S.) 180	313
Cornford *v.* Carlton Bank	[1899] 1 Q. B. 392	561
Cornwall *v.* Henson	[1900] 2 Ch. 298	577
Cottam *v.* Speller	3 Natal L. R. N. S. 130	551
Coutts *v.* The Tailors of Aberdeen	1 Rob. App. 296	133
Cowley's (Lord) Case	[1899] A. C. 198	468
Craig *v.* Duffus	6 Bell's App. 308	528
Craigie *v.* Halket Craigie	19 Fac. Dec. 408	175
Crocker *v.* Banks	4 Times L. R. 324	230
Croft *v.* Rickmansworth Highway Board	39 Ch. D. 272	440
Crookenden *v.* Fuller	1 Sw. & Tr. 441	448
Cross *v.* Muirhead	Hume's Dec. 860	422
Croysdale *v.* Sunbury-on-Thames Urban Council	[1898] 2 Ch. 515	440
Cummings *v.* Darngavil Coal Company	5 F. 513	232
Cunnington *v.* Great Northern Railway Company	49 L. T. 392	642

D.

Dagenham (Thames) Dock Company, In re	L. R. 8 Ch. 1022	577
Dalrymple *v.* Glencairn (Countess of)	Mor. Dict. 15433; 6 Pat. App. 807	173
Dalyell and Selkrig *v.* Dalyell	15 Fac. Dec. 281	174
Danjou *v.* Marquis	3 Sup. Ct. Can. 251	627
Darcy *v.* Allein	11 Rep. 84 b	335
Darling *v.* Gray	19 R. (H. L.) 31	395
Darlington *v.* Roscoe & Sons	[1907] 1 K. B. 219	383
Davis *v.* Hedges	L. R. 6 Q. B. 687	611
D'Huart *v.* Harkness	34 Beav. 324	448
Devlin *v.* Jeffray's Trustees	5 F. 134	232

		PAGE
Dillon *v.* Campbell	Mor. Dict. 15432	134
Direct United States Cable Company *v.* Anglo-American Telegraph Company	2 App. Cas. 394	23
Dixon *v.* Bell	5 M. & S. 198	646
Doughty *v.* Bowman	11 Q. B. 448	74
Douglas *v.* Baynes	[1908] A. C. 477	297
Dowden *v.* Pook	[1904] 1 K. B. 45	335
Drinkwater *v.* Arthur	10 Sup. Ct. Rep. N. S. W. 193	202
Drummond *v.* Van Ingen	12 App. Cas. 284	296
Dublin, Wicklow, and Wexford Railway Company *v.* Slattery	3 App. Cas. 1155	231
Dudgeon *v.* Thomson	1 Macq. 714	528
Dupplin (Viscount) *v.* Hay	10 M. 89	176

E.

Earl *v.* Lubbock	[1905] 1 K. B. 253	642
Eastwood Brothers *v.* Honley Urban Council	[1901] 1 Ch. 645	439
Edmond *v.* Reid	9 M. 782	134
Edwards *v.* Edwards	15 Beav. 357	212
Eglinton (Earl) *v.* Montgomerie	4 D. 425; 2 Bell's App. 149	177
Elderslie Steamship Company *v.* Borthwick	[1905] A. C. 93	371
Ellen *v.* Topp	6 Ex. 424	121
Emery *v.* Wells	[1906] A. C. 477	299
Emmens *v.* Elderton	4 H. L. C. 624	488
Engel *v.* Fitch	L. R. 3 Q. B. 314	494
Engelhart *v.* Farrant	[1897] 1 Q. B. 240	231
Erith Sewer Works Case	[1893] A. C. 562	94
Erlanger *v.* New Sombrero Phosphate Company	3 App. Cas. 1218	339

F.

Farquharson *v.* Imperial Oil Company	30 Sup. Ct. Can. 188	628
Fenton *v.* Thorley	[1903] A. C. 443	32
Finlay *v.* Chirney	20 Q. B. D. 494	395
Finny *v.* Govett	25 Times L. R. 186	281
Fleming to Macmillan, In re	18 N. Z. L. R. 689	637
Flureau *v.* Thornhill	2 W. Bl. 1078	495
Fothergill *v.* Rowland	L. R. 17 Eq. 132	299
Fraser *v.* Fraser	4 S., 1st ed. 73, 2nd ed. 76; 5 W. & S. 69	134
——— *v.* Maitland	2 S. App. 37	134
Freeth *v.* Burr	L. R. 9 C. P. 213	122
French *v.* Brookes	6 Bing. 354	488
Frost *v.* Aylesbury Dairy Company	[1905] 1 K. B. 608	296
Fulham Guardians *v.* Thanet Guardians	6 Q. B. D. 610	467
Fulton *v.* Andrew	L. R. 7 H. L. 448	281

G.

Galloway (Earl) *v.* Bedford (Duke)	4 F. 851	135
Garbutt *v.* Durham Joint Committee	[1906] A. C. 291	318
Gaskell and Walters' Contract, In re	[1906] 2 Ch. 1	184
Gaudet *v.* Brown	L. R. 5 P. C. 134	318

		PAGE
George *v.* Glasgow Coal Company	[1909] A. C. 123	529
George and Richard, The	L. R. 3 A. & E. 466	434
George D. Emery Co. *v.* Wells	[1906] A. C. 515	296
Giblan *v.* National Amalgamated Labourers' Union of Great Britain and Ireland	[1903] 2 K. B. 600	507
Gilbertson *v.* Richards	4 H. & N. 277	276
Gillespie Brothers *v.* Cheney, Eggar & Co.	[1896] 2 Q. B. 59	296
Goodlet *v.* Caledonian Railway Company	4 F. 986	32
Gordon (Creditors of) *v.* Gordon	Mor. Dict. 15384; Elchie's Tailzie, No. 37; 5 Bro. Supp. 774	172, 175
Gower *v.* Postmaster-General	57 L. T. 527	74
Gramophone and Typewriter, Limited *v.* Stanley	[1908] 2 K. B. 105	443
Grand Trunk Railway of Canada *v.* Attorney-General of Canada	[1907] A. C. 65	197
Great Eastern Railway Company *v.* Haughley	L. R. 1 Q. B. 666	81
Greenhorn *v.* Addie	17 D. 860	387
Grieve *v.* Cunningham	8 M. 317	281
Guthrie & Co. *v.* Brechin	15 R. 385	439

H.

Hall *v.* Incorporated Society of Law Agents	3 F. 1059	154
Hallyburton, In the Goods of	L. R. 1 P. & M. 90	448
Hannah *v.* Commissioner of Stamps	21 N. Z. L. R. 409	637
Harrold *v.* Watney	[1898] 2 Q. B. 320	230
Hartley *v.* Harman	11 Ad. & E. 798	493
Henderson *v.* Glasgow Corporation	2 F. 1127	529
Hendry *v.* Caledonian Railway Company	44 Sc. L. R. 584	32
Herbert *v.* McQuade	[1902] 2 K. B. 631	105
Herries (Lord) *v.* Maxwell's Curator	11 M. 396	134
Hewitt *v.* Taylor	[1896] 1 Q. B. 287	318
Hilton *v.* Eckersley	6 E. & B. 47	343
Holroyd *v.* Marshall	10 H. L. C. 191	637
Holt *v.* Lyle	cited 7 Mod. 271	154
Hooper *v.* Clark	L. R. 2 Q. B. 200	74
Hounsell *v.* Smith	7 C. B. (N.S.) 731	232
Howe *v.* Smith	27 Ch. D. 89	577
Hubbard, Ex parte	17 Q. B. D. 690	111
Huber, In the Goods of	[1896] P. 209	448
Hughes *v.* Macfie	2 H. & C. 744; 33 L. J. (Ex.) 177	231
Hull Electric Company *v.* Clement	41 Sup. Ct. Can. 419	628
——— *v.* Ottawa Electric Company	[1902] A. C. 237	197

I.

Illidge *v.* Goodwin	5 C. & P. 190	231
Imperial and Grand Hotels Company *v.* Christchurch Guardians	[1905] 2 K. B. 239	248

		PAGE
Imperial Japanese Government *v.* P. & O. Company	[1895] A. C. 644	566
Incandescent Gas Light Company *v.* Cantelo	12 Rep. Pat. Cas. 262	334
Inglis *v.* Buttery	3 App. Cas. 552	297
Inland Revenue Commissioners *v.* Angus	23 Q. B. D. 579	467
——— *v.* Strang	15 Sc. L. R. 704	106
Innisfallen, The	L. R. 1 A. & E. 72	601
Isle of Wight Railway Company *v.* Tahourdin	25 Ch. D. 320	443

J.

Jacobs *v.* Scott	2 F. (H. L.) 70	296
James *v.* Cochrane	7 Ex. 170	299
Jary *v.* Barnsley Corporation	5 L. G. R. 1145	440
Jewson *v.* Gatti	2 Times L. R. 441	230
Jex-Blake *v.* Senatus of University of Edinburgh	11 M. 784	149
Johnson *v.* Marshall, Sons & Co., Ld.	[1906] A. C. 409	32, 126
Johnstone *v.* Milling	16 Q. B. D. 460	120
Jones *v.* Just	L. R. 3 Q. B. 197	296
——— *v.* Lees	1 H. & N. 189	334
——— *v.* Padgett	24 Q. B. D. 650	296
Jose *v.* Metallic Company of Canada	[1908] A. C. 514	363

K.

Karonchihamy *v.* Angohamy	2 N. L. R. 276; 8 N. L. R. 1	379
Keffe *v.* Milwaukee and St. Paul Railway Company	18 Amer. Rep. 393	230
Kelsey *v.* Dodd	52 L. J. (Ch.) 34	99
King *v.* Boston	7 East, 481	611
——— *v.* Kerrison	3 M. & S. 526	145
——— *v.* Lindsey (Inhabitants)	14 East, 317	145
King's College, Cambridge *v.* Uxbridge Rural Council	[1901] 2 Ch. 768	440
Kingston's (Duchess of) Case	2 Sm. L. C., 11th ed., p. 731	618
Kinning Park Police Commissioners *v.* Thomson & Co.	4 R. 528	145
Kirkheaton Local Board *v.* Ainley	[1892] 2 Q. B. 274	45

L.

Lancashire and Yorkshire Railway Company *v.* Bury Corporation	14 App. Cas. 417	145
Lart, In re	[1896] 2 Ch. 788	618
Lax *v.* Darlington Corporation	5 Ex. D. 28	642
Leather Cloth Company *v.* Lorsont	L. R. 9 Eq. 345	334
Leigh *v.* Lillie	30 L. J. (Ex.) 25	422
Levy *v.* Stogdon	[1898] 1 Ch. 478; [1899] 1 Ch. 5	577
Lewis *v.* Campbell	3 Moore, C. P. 35; 3 B. & Ald. 392	73
——— *v.* Great Western Railway Company	3 Q. B. D. 195	127

		PAGE
Lindsay Petroleum Company *v.* Hurd	L. R. 5 P. C. 221	335
Liverpool Gas Company *v.* Everton	L. R. 6 C. P. 414	248
London and India Docks Company *v.* Thames Steam Tug and Lighterage Company	[1909] A. C. 15	25
London and North Western Railway Company *v.* Cannock	9 L. T. 325	92
——— *v.* Harborne Overseers	34 J. P. 644	37
——— *v.* Irthlingborough	35 L. T. 327	92
London and South Western Railway Company *v.* Gomm	20 Ch. D. 562	275
London Corporation *v.* Netherlands Steamboat Company	[1906] A. C. 263	58
London County Council *v.* Erith	[1893] A. C. 562	250
London General Omnibus Company *v.* Lavell	[1901] 1 Ch. 135	363
London School Board Case	17 Q. B. D. 738	94
Lord Advocate *v.* Crookshanks	15 R. 995	319
——— *v.* Glasgow (Earl)	2 R. 317	189
Lowe *v.* Pearson	[1899] 1 Q. B. 261	32, 530
Lumley *v.* Gye	2 E. & B. 216	510
Lunn *v.* Thornton	1 C. B. 379	637
Lygo *v.* Newbolt	9 Ex. 302	231
Lynch *v.* Nurdin	1 Q. B. 29	230

M.

McCowan *v.* McKay	13 Manitoba Rep. 590	299
Macdonald *v.* Abbott	3 Sup. Ct. Can. 278	627
McDonald *v.* Banana (Owners of S.S.).	[1908] 1 K. B. 926	531
McDowell *v.* Great Western Railway Company	[1903] 2 K. B. 331	231
M'Gillivray's Executors *v.* Masson	19 D. 1099	135
Mackay *v.* Dick & Stevenson	6 App. Cas. 251	580
Mackenzie *v.* Craigie	16 Fac. Dec. 304; 6 Pat. App. 117	422
——— *v.* Gilchrist	16 Fac. Coll. 419	422
——— *v.* Mackenzie	11 D. 596	134, 135
M'Leod *v.* M'Kenzie	6 S. 77	174
MacWhittingham, In re	4 Land Court Cases, 22	202
Main Colliery Company *v.* Davies	[1900] A. C. 358	434
Mallan *v.* May	11 M. & W. 653	334
Manchester Brewery Company *v.* Coombs	[1901] 2 Ch. 608	74
Manchester, Sheffield, and Lincolnshire Railway Company *v.* Brown	8 App. Cas. 703	372
——— *v.* Wallis	14 C. B. 213	231
Mangan *v.* Atterton	4 H. & C. 388; L. R. 1 Ex. 239	230
Marshall's Valve Gear Company *v.* Manning, Wardle & Co.	[1909] 1 Ch. 267	443
Martyn *v.* Williams	26 L. J. (Ex.) 117	100
Marzetti *v.* Williams	1 B. & Ad. 415	488
Massereene *v.* Inland Revenue	[1900] 2 I. R. 138	430
Maw *v.* Jones	25 Q. B. D. 107	489

		PAGE
Maxim Nordenfelt Guns and Ammunition Company *v.* Nordenfelt	[1893] 1 Ch. 630	335
Meedin *v.* Mohideen	3 N. L. R. 27	551
Meenakshi Naidoo *v.* Subramaniya Sastri	L. R. 14 Ind. Ap. 160	566
Mersey Docks and Harbour Board *v.* Birkenhead Assessment Committee	[1901] A. C. 175	81
Mersey Steel and Iron Company *v.* Naylor	9 Q. B. D. 648; 9 App. Cas. 434	122, 298
Midland Railway Company *v.* Attorney-General	[1902] A. C. 171	5, 11
Milroy *v.* Lord	4 D. F. & J. 264	637
Mogul Steamship Company *v.* McGregor, Gow & Co.	[1892] A. C. 25	334
Mondel *v.* Steel	8 M. & W. 858	600
Moore *v.* Manchester Liners, Limited	[1909] 1 K. B. 417	531
Morgan *v.* Davey	Cab. & E. 114	276
Morris *v.* Delobbel-Flipo	[1892] 2 Ch. 352	111
Moss *v.* Wilson	8 N. L. R. 368	551
Mullen *v.* Stewart & Co.	(1908) S. C. 991	531

N.

Natal Land and Colonization Company *v.* Schussler	5 Natal L. R. N. S. 10	551
Neilson *v.* Rodger	16 D. 325	396
Nelson Line (Liverpool), Limited *v.* James Nelson & Sons, Limited	[1908] A. C. 16	371
Newfoundland Government *v.* Newfoundland Railway Company	13 App. Cas. 199	600
Newlands *v.* National Employers' Accident Association	54 L. J. (Q.B.) 428	244
Newport Dock Company *v.* Newport Board	2 B. & S. 708	266
Nordenfelt *v.* Maxim Nordenfelt Guns and Ammunition Company	[1894] A. C. 535	334
North Eastern Railway Company *v* Leadgate Local Board	L. R. 5 Q. B. 157	266
North Staffordshire Railway Company *v.* Dale	8 E. & B. 836	145
Northard *v.* Pepper	17 C. B. (N.S.) 39	318
Northumberland's (Duke of) Case	[1905] A. C. 406	171
Nottingham County Council *v.* Manchester, Sheffield, and Lincolnshire Railway Company	71 L. T. 430	257
Notting Hill Case	9 P. D. 105	498

O.

O'Donovan *v.* Cameron, Swan & Co.	[1901] 2 I. R. 633	383
Ogden *v.* Nelson	[1903] 2 K. B. 287	297
Ogilvie, In re	L. R. 7 Ch. 174	217
O'Keefe *v.* Lovatt	18 Times L. R. 57	387
Oldham Case	1 O'M. & H. 151	154
Olive *v.* Ingram	7 Mod. 263	154
O'Mahoney *v.* Burdett	L. R. 7 H. L. 388	212
Ottawa Electric Company *v.* Brennan	31 Sup. Ct. Can. 311	624

P.

		PAGE
Panton *v.* Mackintosh	(1908) S. C. 647, n.	134
Parker *v.* Duncan	62 L. T. 642	281
Parry *v.* Smith	4 C. P. D. 325	642
Parsons, Ex parte	16 Q. B. D. 532	116
Pasmore *v.* Oswaldtwistle Urban Council	[1898] A. C. 387	47, 440
Paterson *v.* Blackburn Corporation	9 Times L. R. 55	642
Payne *v.* Rex	[1902] A. C. 552	636
Peareth *v.* Marriott	22 Ch. D. 182	618
Peek *v.* North Staffordshire Railway Company	10 H. L. C. 472	372
Peninsular and Oriental Steam Navigation Company *v.* Shand	3 Moo. P. C. (N.S.) 272	372
Penn *v.* Alexander	[1893] 1 Q. B. 522	467
Petrocochino *v.* Bott	L. R. 9 C. P. 355	371
Peyton, In re	7 H. & N. 265	183
Podi Sinno *v.* Appuhamy	3 Balasingham, 145	551
Pollard, In re	5 Moo. P. C. (N.S.) 111; L. R. 2 P. C. 106	312
Pomfret *v.* Lancashire and Yorkshire Railway Company	[1903] 2 K. B. 718	529
Pordage *v.* Cole	1 Wms. Saund. 319 l.	119
Powell *v.* Kempton Park Racecourse Company	[1899] A. C. 143	318
—— *v.* Main Colliery Company	[1900] A. C. 366	32, 387
Powell Duffryn Steam Coal Company *v.* Taff Vale Railway Company	L. R. 9 Ch. 331	299
Power *v.* Griffin	33 Can. Sup. Ct. Rep. 39	335
Poynting *v.* Faulkner	93 L. T. 367	105
Preist *v.* Last	[1903] 2 K. B. 148	297
Prentice *v.* Assets Company	17 R. 484	232
Price, In re	[1900] 1 Ch. 442	448
Priestman *v.* Thomas	9 P. D. 70, 210	618
Proctor *v.* Sargent	2 Man. & G. 20	119
Public Works Commissioner *v.* Hills	[1906] A. C. 368	577

Q.

Queen *v.* Clarke	[1906] 2 I. R. 135	434
Queensberry Leases, The	1 Bli. 339	135
Quinn *v.* Leathem	[1901] A. C. 495	508

R.

Railroad Company *v.* Stout	17 Wall. (U. S.) 657	242
Ramsay *v.* Craig	20 Jour. of Jurisprudence, 483	152
Randall *v.* Newson	2 Q. B. D. 102	297
Rapson *v.* Cubitt	9 M. & W. 710	642
Raymond *v.* Fitch	2 C. M. & R. 588	100
Reed *v.* Great Western Railway Company	[1909] A. C. 31	524, 529
Reg. *v.* Birmingham Waterworks	1 B. & S. 84	267
—— *v.* Birmingham and Gloucester Railway Company	2 Q. B. 47	256
—— *v.* Clarke	[1906] 2 I. R. 135	32

		PAGE
Reg. *v.* Cohen	8 Cox, C. C. 41	318
—— *v.* Crosthwaite	17 Ir. C. L. R. 157	152
—— *v.* Essex Justices	[1895] 1 Q. B. 38	249
—— *v.* Eyre	6 E. & B. 992	249
—— *v.* Gainsborough Union	L. R. 7 Q. B. 64	37
—— *v.* Great Western Railway Company	62 L. J. (Q.B.) 572	145
—— *v.* Hall Dare	5 B. & S. 785	38
—— *v.* Hutchings	6 Q. B. D. 300	618
—— *v.* Lincoln Corporation	8 A. & E. 65	256
—— *v.* Llantrissant	L. R. 4 Q. B. 354	81
—— *v.* London and Birmingham Railway Company	1 Ry. & Ca. Cas. 317	257
—— *v.* London and Brighton Railway Company	15 Q. B. 313; 20 L. J. (M. C.) 124	88
—— *v.* London and North Western Railway Company	L. R. 9 Q. B. 134	92
—— *v.* London Justices	9 Q. B. 41	249
—— *v.* Middlesex Waterworks	1 E. & E. 716	87
—— *v.* Senior	[1899] 1 Q. B. 283	127
—— *v.* Sherford (Inhabitants)	L. R. 2 Q. B. 503	38
—— *v.* Sleep	Leigh & Cave, C. C. 44	318
—— *v.* Smith	55 L. J. (M.C.) 49	37
—— *v.* ——	5 Q. B. 614	313
—— *v.* Surrey Justices	6 Q. B. D. 100	248
—— *v.* Vange	3 Q. B. 242	37
—— *v.* Wells	L. R. 2 Q. B. 542	37
Reist *v.* Grand Trunk Railway Company	6 Upp. Can. Rep. C. P. 421	627
Renfrew Magistrates *v.* Hoby	2 Macq. 478	528
Rex *v.* Adames	4 B. & Ad. 61	38
—— *v.* Buckinghamshire Justices	3 East, 342	249
—— *v.* Cross	3 Camp. 226	57
—— *v.* Gaskin	8 T. R. 209	313
—— *v.* New River Company	1 M. & S. 503	93
—— *v.* Staffordshire Justices	7 East, 549	249
—— *v.* West Riding of Yorkshire	7 East, 588	256
—— *v.* West Riding of Yorkshire Justices	[1908] 2 K. B. 635	247
—— *v.* Whitechapel	6 A. & E. 34	58
Ricketts *v.* East and West India Docks Company	12 C. B. 160	231
River Wear Commissioners *v.* Adamson	2 App. Cas. 743	5
Robertson *v.* Allan Brothers & Co.	98 L. T. 821	531
Rogers and Broughton, In re	10 N. S. W. L. R. 179	202
Rogers *v.* Hosegood	[1900] 2 Ch. 388	75, 100
Rolin *v.* Steward	14 C. B. 595	488
Rorke *v.* Errington	7 H. L. C. 617	66
Rose *v.* Watson	10 H. L. C. 672	202
Ross *v.* Sutherland (Duchess)	16 S. 1179	134
Rumboll *v.* Nunnery Colliery Company	80 L. T. 42	127

S.

Ste. Cunégonde (City of) *v.* Gougeon	25 Sup. Ct. Can. 78	628
Saltoun (Lord) *v.* Advocate-General	3 Macq. 659	170
Sampson *v.* Easterby	9 B. & C. 505; 6 Bing. 644	74, 77

		PAGE
Schnadhorst, In re	[1902] 2 Ch. 234	213
Schotsmans *v.* Lancashire and Yorkshire Railway Company	L. R. 2 Ch. 332	111
Seaville *v.* Colley	9 Juta, 39	380
Shaw *v.* Foster	L. R. 7 H. L. 321	202
Shedden *v.* Patrick	L. R. 1 H. L. Sc. 470	150
Shepherd *v.* Halloran	4 N. S. W. State Rep. 542	203
Sherras *v.* De Rutzen	[1895] 1 Q. B. 918	319
Shower *v.* Pilck	4 Ex. 478	637
Sikes *v.* Wild	1 B. & S. 587	495
Simms *v.* Registrar of Probates	[1900] A. C. 323	467, 637
Simpson *v.* Attorney-General	[1904] A. C. 476	233
Singleton *v.* Eastern Counties Railway Company	7 C. B. (N.S.) 287	231
Sion College *v.* London Corporation	[1901] 1 K. B. 617	58
Sitwell, Ex parte	21 Q. B. D. 466	190
Skeete *v.* Buchanan	7 R. 15	176
Smith *v.* Andrews	[1891] 2 Ch. 681	233
—— *v.* Bank of Scotland	1 Dow. 272	283
—— *v.* Lancashire and Yorkshire Railway Company	[1899] 1 Q. B. 141	32, 530
—— *v.* Thompson	8 C. B. 44	499
Solicitor-General *v.* Law Reversionary Interest Society	L. R. 8 Ex. 233	183
Sondes (Lord) *v.* Fletcher	5 B. & Al. 835.	498
Sopi Nona *v.* Marsiyan	6 N. L. R. 379.	378
South American and Mexican Company, In re	[1895] 1 Ch. 37	618
South Eastern Railway Company *v.* Dorking	3 E. & B. 491	82
South Wales Railway Company *v.* Swansea Local Board	4 E. & B. 189	265
Southampton (Lord) *v.* Browne	6 B. & C. 718	100
Spencer *v.* Midland Railway Company	11 Times L. R. 408, 542	111
Spencer's Case	5 Rep. 16 a ; 1 Sm. L. C., 11th ed., p. 55	73, 100
Spicer *v.* Martin	14 App. Cas. 12	100
Steel *v.* State Line Steamship Company	3 App. Cas. 72.	460
Steinman & Co. *v.* Angier Line	[1891] 1 Q. B. 619	371
Stephan *v.* Estate of J. C. Stephan	12 Cape Town Rep. 242	349
Stevens *v.* Copp	L. R. 4 Ex. 20	74
Stowe *v.* Jolliffe	L. R. 9 C. P. 734	155
Strongitharm *v.* North Lonsdale Iron and Steel Company	21 Times L. R. 357	297
Sullivan *v.* Creed	[1903] 2 I. R. 317	230
Sutton *v.* Norwich Corporation	27 L. J. (Ch.) 739	439
Sutty's Case	5 Bro. Supp. 866	172

T.

Tatnall *v.* Hankey	2 Moo. P. C. 342	447
Taubman *v.* Pacific Steam Navigation Company	1 Asp. M. L. C. 336	372
Thomas *v.* Hayward	L. R. 4 Ex. 311	74, 100
——— *v.* Winchester	6 N. Y. R. 397	646
Thompson *v.* Royal Mail Steam Packet Company	5 Asp. M. L. C. 190, n.	372
Thorpe *v.* Thorpe	3 B. & Ad. 580	496

		PAGE
Tod *v.* Moncreiff	2 S., 1st ed. 113, 2nd ed. 104; 1 W. & S. 217	134
Toronto Corporation *v.* Bell Telephone Company of Canada	[1905] A. C. 52	195
Tulk *v.* Moxhay	2 Ph. 774	100
Turnbull *v.* Hay Newton	14 S. 1031	176
Turner *v.* Cuxon	22 Q. B. D. 150	106
Turton *v.* Cooper	92 L. T. 863; 5 Tax Cases, 138	106
Tyrrell *v* Painton	[1894] P. 151	281

U.

United Collieries *v.* M'Ghie	6 F. 808	127

V.

Vaughan *v.* Nicoll	8 F. 464	126, 529
Vernon *v.* Smith	5 B. & Ald. 1	74, 99
Villar *v.* Gilbey	[1907] A. C. 139	434
Vyvyan *v.* Arthur	1 B. & C. 410	74, 100

W.

Waddle *v.* Sunderland Union	[1906] 2 K. B. 899	38
Wade *v.* Cockerline	10 Com. Cas. 115	372
Wakefield Corporation *v.* Wakefield and District Light Railway Company	[1908] A. C. 293	266
Wakelin *v.* London and South Western Railway Company	12 App. Cas. 41	536
Walter *v.* Simpson	[1902] A. C. 208	355
Warwick *v.* Nairn	10 Ex. 762	600
Webb *v.* Russell	3 T. R. 393	74
Weir *v.* Grace	2 F. (H.L.) 30	281
West Lancashire Rural Council *v.* Lancashire and Yorkshire Railway Company	[1903] 2 K. B. 394	145
Wharncliffe's (Lord) Case	24 Scot. Jur. 553	176
White *v.* Beeton	7 H. & N. 42	120
——— *v.* Buccleuch (Duke)	L. R. 1 H. L. Sc. 70	528
——— *v.* Southend Hotel Company	[1897] 1 Ch. 767	74
Whiting *v.* Force	2 Beav. 571	213
Wijeyskoon *v.* Goonewardene	2 Ceylon L. R. 59	552
Williams *v.* Commissioner of Stamps	24 N. Z. L. R. 658	637
——— *v.* Eady	10 Times L. R. 41	230
——— *v.* Ocean Coal Company	[1907] 2 K. B. 422	434
——— *v.* London and North Western Railway Company	[1900] 1 Q. B. 760	265
——— *v.* Vauxhall Colliery Company	23 Times L. R. 591	387
Wilson *v.* Salford (Town Clerk of)	L. R. 4 C. P. 398	154
Wilton *v.* Royal Atlantic Mail Steam Navigation Company	30 L. J. (C.P.) 369	372
Withers *v.* Reynolds	2 B. & Ad. 882	299
Wolverton (Lord) *v.* Attorney-General	[1898] A. C. 535	183
Woodall *v.* Clifton	[1905] 2 Ch. 257	74
Woodward *v.* Gyles	2 Vern. 119	422

Z.

Zetland's (Lord) Case	3 App. Cas. 505	170

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.) 1908 *April* 3.

GREAT NORTHERN, PICCADILLY AND BROMPTON RAILWAY COMPANY . . } APPELLANTS;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

Revenue—Company with Liability limited otherwise than by Registration—Increase of Amount of Nominal Share Capital authorized by Act—Transfer of Powers, Liabilities, and Immunities to another Railway Company—Double Duty—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

The G. Railway Company was incorporated by an Act of Parliament in 1899 with a capital of 2,400,000*l.*, and duly paid the duty thereon under the Stamp Act, 1891. The B. Railway Company was incorporated by an Act of 1897 with a capital of 600,000*l.*, and duly paid the duty thereon under the Act of 1891. By an Act of 1902 all the powers, rights, privileges, liabilities, and immunities of the G. Railway Company were transferred to the B. Railway Company, and the G. Railway Company was dissolved:—

Held, that by the transfer there was "an increase of the amount of

H. L. (E.)
1908
GREAT NORTHERN, PICCADILLY AND BROMPTON RAILWAY v. ATTORNEY-GENERAL.

nominal share capital of the B. Company authorized by" the Act of 1902 to the extent of 2,400,000*l.*, and that the duty thereon must be paid by the B. Railway Company, under the Stamp Act, 1891.

UPON an information for penalties brought by the Attorney-General against the appellant company the material facts were agreed to be as follows:—

By the Great Northern and Strand Railway Act, 1899 (62 & 63 Vict. c. cciii.), the Great Northern and Strand Railway Company was incorporated with a capital of 2,400,000*l.* in 240,000 shares of 10*l.* each, and a statement thereof was delivered duly stamped in accordance with s. 113 of the Stamp Act, 1891. None of this capital was, however, issued before the passing of the Brompton and Piccadilly Circus Railway Act, 1902.

By the Brompton and Piccadilly Circus Railway Act, 1897 (60 & 61 Vict. c. cxcii.), a company was incorporated with a capital of 600,000*l.* under the name of "The Brompton and Piccadilly Circus Railway Company"; a statement of this capital was delivered duly stamped under the Stamp Act, 1891.

By s. 40 of the Great Northern and Strand Railway Act, 1902 (2 Edw. 7, c. ccxxxv.), it was provided (inter alia) as follows:—

"If the Brompton Bill" (a then pending Bill which subsequently passed as the Brompton and Piccadilly Circus Railway Act, 1902) "becomes law during the present session of Parliament . . . . the following provisions shall have effect:—

"(1.) On and as from the date on which the Brompton Bill receives the Royal Assent or the date of the passing of this Act whichever shall last occur (in this Act referred to as 'the date of transfer') all the powers, rights, privileges and authorities conferred upon the Great Northern and Strand Railway Company by the Act of 1899 as amended by this Act and this Act or any Acts wholly or partly incorporated therewith respectively . . . . shall subject to the provisions of this Act be transferred to, vested in and imposed upon the Brompton and Piccadilly Circus Railway Company, and all the rights, powers, privileges, obligations and liabilities of the Great Northern and Strand Railway Company, their directors, officers and servants respectively which by virtue of the Act of 1899 as amended by this Act or this Act or any Act or Acts wholly or partly incorporated

with those Acts respectively might be exercised or enjoyed by them or are imposed upon them respectively for the purposes of or in relation to the said railways and undertaking shall be exercised, enjoyed, fulfilled and discharged by the Brompton and Piccadilly Circus Railway Company, their directors, officers and servants respectively under and with the same regulations, restrictions, conditions, obligations, penalties and immunities in accordance with the aforesaid Acts respectively as by the Great Northern and Strand Railway Company and their directors, officers and servants respectively and the provisions of the Act of 1899 as amended by this Act and the provisions of this Act (so far as they relate to the Great Northern and Strand Railway Company) including the provisions of any Act or Acts wholly or partly incorporated with those Acts respectively (except those relating to the constitution of the Great Northern and Strand Railway Company but including those relating to the raising of money by shares or stock and by borrowing or debenture stock and the provisions of s. 84 of the Act of 1899 as to power to pay interest out of capital during construction) shall subject to the provisions of this Act be read and have effect as if the Act of 1899 and the aforesaid provisions of this Act had been passed with respect to the Brompton and Piccadilly Circus Railway Company instead of with respect to the Great Northern and Strand Railway Company."

"(2.) On and as from the date of transfer the Great Northern and Strand Railway Company shall be by this Act dissolved."

The Brompton Bill above referred to, which contained the powers referred to in s. 40 of the Great Northern and Strand Railway Act, 1902, and provided that as from the passing of the said Bill or the passing of the Bill for the Great Northern and Strand Railway Act, 1902, whichever should last happen, the name of the Brompton and Piccadilly Circus Railway Company should be "The Great Northern, Piccadilly and Brompton Railway Company," received the Royal Assent on November 18, 1902, after the passing of the Great Northern and Strand Railway Act, 1902, aforesaid, and as from that date the provisions of s. 40 of the Great Northern and Strand Railway Act, 1899, took effect.

H. L. (E.) 1908

GREAT NORTHERN, PICCADILLY AND BROMPTON RAILWAY v. ATTORNEY-GENERAL.

No statement of an increase of nominal share capital was delivered by the defendant company subsequently to the passing of the Brompton and Piccadilly Circus Railway Act, 1902, in respect of the 2,400,000*l.* nominal share capital authorized by the Great Northern and Strand Railway Act, 1899.

The questions for the Court were—(1.) whether there was by virtue of the Great Northern and Strand Railway Act, 1902, and the Brompton and Piccadilly Circus Railway Act, 1902, an increase of the nominal share capital of the defendant company in respect of the 2,400,000*l.* authorized by the Great Northern and Strand Railway Act, 1899, within the meaning of s. 113 of the Stamp Act, 1891; (2.) whether, if there was such an increase in the nominal share capital of the defendant company, the defendant company were liable, notwithstanding the provisions of the Great Northern and Strand Railway Act, 1902, and the Brompton and Piccadilly Circus Railway Act, 1902, to render a statement of such increase of nominal share capital so as to be chargeable under s. 113 of the Stamp Act, 1891, with an ad valorem stamp duty.

Walton J., upon the construction of the special Acts, held that there was no new grant of power to raise capital, and that the defendant company were entitled to judgment. This decision was reversed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.), who answered both questions in the affirmative. Hence this appeal.

Lush, *K.C.*, and *Roskill*, *K.C.* (*Ernest M. Pollock*, *K.C.*, with them), for the appellants. Walton J. put the true construction upon the Acts. There was authority given to the Strand Company by the Strand Act, 1899, to raise 2,400,000*l.*, and stamp duty was paid upon it. No new authority was granted to the appellants to raise that amount of capital. The appellants had authority to raise 600,000*l.* by their Act of 1897 and paid the stamp duty thereon. If they are liable to pay the duty on the 2,400,000*l.* the duty will be paid twice over. The only authority was the old one. The Acts are to be read and have effect as if the Act of 1899 had been passed with respect to the appellants. The appellants are in the same position in respect of the

2,400,000*l.* and hold the capital with the same restrictions, conditions, and "immunities" as those with which the Strand Company held it.

Sir W. S. Robson, A.-G. (*William Finlay* with him), for the respondents. The authority given to the appellants to raise the 2,400,000*l.* was a new authority so far as they were concerned. It could only be conferred by statute. They cannot deny that an increase of the amount of nominal capital was authorized to them in 1902. This construction is the natural one, and it brings the case within the principle of *Midland Ry. Co.* v. *Attorney-General.* (1) No private Act containing a bargain between parties ought to be construed so as to deprive the public, the Crown, or any one of a right or privilege: see *River Wear Commissioners* v. *Adamson*, per Lord Blackburn. (2) By the Stamp Act, 1891, s. 113, where by virtue of any Acts the liability of the holders of shares in the capital of any company is limited otherwise than by registration with limited liability, a statement of the amount of nominal share capital of the company shall be delivered by the company to the Commissioners within one month after the passing of the Act; and in case of "any increase of the amount of nominal share capital of any company whether now existing or to be hereafter formed being authorized by any Act a statement of the amount of such increase shall be delivered by the company to the Commissioners within the like period." And then follow the duties, with penalties for neglect to deliver the statement.

[He was stopped.]

LORD LOREBURN L.C. My Lords, I must say that I think this is a very plain case. The question is, Has there been an increase of the amount of the nominal share capital of the appellant company authorized by an Act? Now what is the appellant company? It is the Brompton and Piccadilly Circus Railway Company under a different name imposed upon it by s. 64 of its Act of 1902. The Brompton Company had, before the Great Northern Act of 1902, authority to raise capital which we were told was 600,000*l.* After that Act was passed it had

(1) [1902] A. C. 171. (2) (1887) 2 App. Cas. 743, 766.

H. L. (E.) 1908

GREAT NORTHERN, PICCADILLY AND BROMPTON RAILWAY v. ATTORNEY-GENERAL.

Lord Loreburn L.C.

authority to raise 2,400,000*l.* more. Surely that was an increase of the amount of the nominal capital authorized by an Act? Why then ought the appellants not to be made subject to this duty? The real reason suggested is that the Great Northern and Strand Company had this authority under their Act of 1899. That is quite true; but it is also true that the appellant company now has it, and on getting it there was an increase of the amount of their nominal capital authorized by an Act.

It may be a hard case, but the result cannot be avoided by appealing to this clause, s. 40, in a private Act. The Courts will take every means of defeating an attempt by a private Act to affect the rights either of the Crown or of other persons who have not been brought in. And I desire to say for myself that I am not satisfied in regard to these private Acts of Parliament that there are sufficient means either for securing accurate drafting or for safeguarding the rights of persons other than those who are concerned in the private legislation.

LORDS ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, ROBERTSON, ATKINSON, and COLLINS concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 3, 1908.

Solicitors: *R. Hill Dawe; Sir Francis C. Gore, Solicitor of Inland Revenue.*

[HOUSE OF LORDS]

LONDON AND INDIA DOCKS COMPANY . APPELLANTS;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

H. L. (E.) 1908 *May* 8.

Revenue—Stamp Duty—Company—Consolidation of Debenture Stock—Issue of Loan Capital—Finance Act, 1899 (62 & 63 *Vict. c.* 9), *s.* 8.

Under the powers of their special Act a company incorporated in the United Kingdom "modified the rights" of the holders of their existing debenture stock (which bore interest at 4 per cent.) by dividing it into two classes of debenture stock, A and B, in certain proportions, called in and cancelled the certificates of the existing stock, and gave to the holders certificates of the new A and B stock (which bore interest at 3 per cent.) in such amounts as to give to each holder interest equivalent to his former interest. The interest on the B stock ranked next after the interest on the A stock:—

Held, that this was an "issue of debenture stock" within the meaning of the Finance Act, 1899, s. 8, and that the company were liable to the duties imposed by the Act.

In an action by the Attorney-General against the London and India Docks Company claiming duties and penalties under s. 8 of the Finance Act, 1899, the following special case was stated by consent.

1. The defendants are a company in the United Kingdom incorporated by the London and St. Katharine Docks Act, 1864, under the name of the London and St. Katharine Docks Company, changed by the London and India Docks Amalgamation Act, 1900, to the London and India Docks Company.

2. Between 1864 and 1900 (both inclusive) the defendant company from time to time, under divers Acts of Parliament empowering them, issued and there was existing on January 1, 1901, being the day referred to as the date of amalgamation in the London and India Docks Amalgamation Act, 1900, debenture stock to the amount of 3,032,377*l.* 16*s.* 4*d.*, bearing interest at the rate of 4 per cent.

3. By the London and India Docks Amalgamation Act, 1900 (63 & 64 Vict. c. cxi.) (in which Act the defendant company was referred to as "the London Company"), after providing (inter

H. L. (E.) 1908

LONDON AND INDIA DOCKS COMPANY v. ATTORNEY-GENERAL.

alia) by s. 4 for the dissolution of the East and West India Dock Company on the date of amalgamation and for the transfer of its undertaking to the London Company, it was provided (inter alia) as follows:—

"Sect. 2. The Companies Clauses Act, 1863, as amended by the Companies Clauses Act, 1869, is, except where varied by and inconsistent with this Act, incorporated with and forms part of this Act.

"Sect. 11. On and after the date of amalgamation the following provisions shall have effect (that is to say):—

"(1.) The then existing debenture stock of the London Company is hereby divided into debenture stock of two classes to be called and hereinafter referred to as respectively 'A debenture stock' and 'B debenture stock' and the rights attached to the said debenture stock are hereby modified accordingly.

"(2.) The nominal amount of A debenture stock shall, subject to increase as hereinafter mentioned, be equal to 61 per centum of the total nominal amount of the then existing debenture stock.

"(3.) The nominal amount of B debenture stock shall, subject to increase as hereinafter mentioned, be equal to 39 per centum of the total nominal amount of the then existing debenture stock.

"(4.) Subject to the provisions of this Act the A debenture stock shall bear interest at the rate of three per centum per annum, subject to and ranking next after the principal of and interest upon any sum or sums of money to be borrowed by the London Company in order to provide working capital under the provisions hereinafter contained.

"(5.) The B debenture stock shall bear interest at the rate of three per centum per annum subject to and ranking next after the interest on A debenture stock.

"Sect. 14. On and from the date of amalgamation the rights of each holder of existing debenture stock of the London Company in respect of his holding of such stock are hereby modified as follows, viz.:—Such holding is by this Act divided into two parts one of which shall consist of 61 per centum of such holding and shall become and be A debenture stock of the like

nominal amount and the other of such parts shall consist of 39 per centum of such holding and shall become and be B debenture stock of the like nominal amount. And each such holder shall be entitled to a further nominal amount of B debenture stock to be deemed fully paid up equal to one-third of the nominal amount of the existing debenture stock of the London Company held by him.

"Sect. 17. Immediately after the date of amalgamation every holder of stock or debenture stock of the London Company or the East and West India Company shall deliver up to the London Company the certificate of the stock or debenture stock held by him to be cancelled and the directors of the London Company shall as soon as reasonably may be thereafter deliver to him proper certificates in exchange (such certificates to be signed by one director and the secretary) but the holder of any such stock or debenture stock shall not be entitled to any such certificate until he shall have so delivered up to the London Company to be cancelled his existing certificates or shall have proved to the reasonable satisfaction of the London Company the loss or destruction thereof.

"Sect. 18. . . . . After the fourteenth day of December One thousand nine hundred the London Company may refuse to register any transfer of any of their stocks unless the stock comprised in such transfer is described therein by the denomination given to such stock by this Act.

"Sect. 20. The several proprietors or holders of the modified or substituted stock or debenture stock of the London Company to which they are entitled under the provisions of this Act shall hold such stock or debenture stock on the same trusts and obligations and subject to the same powers provisions charges and liabilities as those upon or to which the stock or debenture stock which is represented by such stock or debenture stock of the London Company were immediately before the date of the amalgamation held or subject and so as to give effect to and not revoke any deed or instrument or any testamentary disposition of or affecting the same.

"Sect. 22. Notwithstanding anything in this Act contained no person shall become entitled under this Act to any fractional

H. L. (E.) 1908

LONDON AND INDIA DOCKS COMPANY v. ATTORNEY-GENERAL.

part of a pound of stock of any denomination (including debenture stock) of the London Company, but in every case in which any person would but for this enactment have become entitled to a fractional part of a pound of any such stock the London Company shall pay to such person in cash a sum equal to the nominal value of such fractional part out of any moneys in their hands borrowed by them for working capital or otherwise as they may think fit. And the London Company may refuse to register any transfer of stock including debenture stock for any fractional part of a pound."

4. The Act received the Royal assent on July 30, 1900. That Act and the Acts therein referred to were to be taken as part of the case.

5. The sum of 1,010,792*l.* 12*s.* 1*d.* was the nominal amount of the B debenture stock required to provide the further nominal amount of such stock to which each debenture stockholder of the London Company became on the date of amalgamation entitled under s. 14 of the Act. The defendants duly delivered to the Commissioners of Inland Revenue a statement of the 1,010,792*l.* 12*s.* 1*d.* B debenture stock in accordance with s. 8, sub-s. 1, of the Finance Act, 1899, and paid the duty payable in respect of the same statement under s. 8, sub-s. 2, of the same Act, and no duty or penalties is or are now claimed in respect of the issue of such further stock.

6. The aggregate nominal amount of the A and B debenture stock referred to in ss. 11 and 14 of the said Act (after deducting the sum of 1,010,792*l.* 12*s.* 1*d.* B debenture stock and neglecting a small decrease due to fractions of a pound being dealt with under s. 22) was 3,032,377*l.* 16*s.* 4*d.*

The questions for the opinion of the Court were:—

1. Whether the defendants had under the Amalgamation Act proposed to issue or issued any loan capital in excess of 1,010,792*l.* 12*s.* 1*d.* to the persons who were at the date of amalgamation holders of debenture stock of the London Company, and, if so, to what amount.

2. Whether a statement of the whole or any part of the debenture stock for 3,032,377*l.* 16*s.* 4*d.* was deliverable by the defendants to the Commissioners of Inland Revenue under

s. 8, sub-s. 1, of the Finance Act, 1899, and, if so, of what amount.

3. Whether the defendants were liable to pay the duties and penalties claimed or any part thereof.

Walton J. entered judgment for the Crown for the amount claimed, namely, 12,887*l.* 14*s.*, being 3790*l.* 10*s.* for duties and 9097*l.* 4*s.* for penalties, and this decision was affirmed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.). Hence this appeal. The penalties were afterwards waived by the Crown.

Upjohn, K.C., and *Cecil W. Turner*, for the appellants. To incur the duties under s. 8 of the Finance Act there must be an "issue" or proposal to issue "loan capital." There was no issue of loan capital, or at all events none in excess of the 1,010,792*l.* 12*s.* 1*d.* No fresh loan in substance or form was created or issued or existed, and no fresh capital was created or issued or existed. All that was done was to modify existing rights and to transfer to the holders a stock in a different form in lieu of the existing stock. The only loan and capital that existed was the loan and capital which existed at the time of the issue of the existing stock, and that issue was the only issue. The effect of the decisions below is to make duties payable twice over. The Courts below relied on the decisions in *Midland Ry. Co.* v. *Attorney-General* (1) and *Attorney-General* v. *Regent's Canal and Dock Co.* (2), but the first of those decisions was upon quite different words in a different Act, and in the second the original stock was extinguished, which was not the case here. The duty imposed by s. 8 of the Finance Act, 1899, is upon the proposal to issue any loan capital, not upon the issue, and there was no proposal here.

Sir W. S. Robson, A.-G., and *Finlay*, for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, I do not think your Lordships need have any hesitation in affirming the decision of the Court of Appeal. The matter is so simple that it is unnecessary for me to say much.

(1) [1902] A. C. 171. (2) [1904] 1 K. B. 263.

H. L. (E.)
1908
LONDON AND INDIA DOCKS COMPANY v. ATTORNEY-GENERAL.
Lord Loreburn L.C.

The first point taken was that this was not an issue of stock. It is quite clear to my mind that it was. The stock now in existence had no existence at all until after the Act passed; something different existed, different both in amount and in security. Whatever words were by the ingenuity of the draftsman used, the fact is that the debenture stock which is now held by its owners must have been issued. To prevent what is in fact an issue from being an issue also in law ambiguities of expression in a private Act will not suffice. The second point was that this was not an issue of anything described in sub-s. 5 of s. 8 of the Finance Act, 1899. The answer is that it is debenture stock, and debenture stock is there named.

It is clear, upon all the grounds stated by Walton J. and the Court of Appeal, that this appeal ought to be dismissed, and I move your Lordships accordingly.

LORDS ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, and ATKINSON concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 8, 1908.

Solicitors: *E. F. Turner & Sons; Sir Francis C. Gore, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

MIDLAND RAILWAY COMPANY . . . . APPELLANTS; H. L. (E.)
1908
AND
MYERS, ROSE & CO., LIMITED . . . . . RESPONDENTS. *July* 16.

Railway—Siding Accommodation—Rates and Charges—"Such reasonable Sum as the Company may think fit in each Case"—Reasonableness a Question for Jury—Provisional Order of Board of Trade—Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 *Vict. c. ccxix.*).

The schedule of maximum rates and charges annexed to a provisional order of the Board of Trade with reference to the Midland Railway Company fixed as the maximum charge "for any accommodation or services rendered by the company within the scope of their undertaking by the desire of a trader and in respect of which no provisions are made by this schedule such reasonable sum as the company may think fit in each case."

The company gave notice to a trader that they would make a certain charge for waggons remaining on the company's "wait order sidings" beyond a specified time and sued for the charges:—

Held, that this was accommodation provided by the company within the scope of their undertaking within the meaning of the schedule, and that the reasonableness of the charges was a question of fact for a jury.

Decision of the Court of Appeal, [1908] 2 K. B. 356, affirmed.

SECT. 4 of a provisional order of the Board of Trade, confirmed by the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, provided that the maximum rates and charges which the Midland and certain other railway companies should be entitled to make in respect of merchandise traffic on their railways should be the rates and charges specified in the schedule to the order. Part IV. of the schedule enumerated, among other items, the "accommodation or services" stated in the head-note. The Midland Railway Company gave notice to the respondents, who were coal factors, that sixpence a day per waggon would be charged for waggons remaining on the "wait order sidings" after a specified time, and sued the respondents to recover a large sum in respect thereof. The respondents contended (inter alia) that the charges were not reasonable. At the trial before Lawrance J. and a special jury the learned judge withdrew the case from the jury, and gave

H. L. (E.) 1908

MIDLAND RAILWAY v. MYERS, ROSE & Co., LIMITED.

judgment for the appellants on the ground that there was a contract to pay the charges. The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.) reversed that decision, and ordered a new trial on the ground that the reasonableness of the charges was a question of fact for the jury. Hence this appeal.

July 14, 16. *C. A. Cripps, K.C.*, and *C. A. Russell, K.C.* (*Frank Gover* with them), for the appellants, contended that the appellants were not bound to provide wait order sidings for the respondents, that the case did not come within Part IV. of the schedule, and that there was an implied contract to pay the charges.

Lush, K.C., *Bailhache, K.C.*, and *Snowden*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, this is in my opinion a clear case. It has been amply dealt with by the Court of Appeal, and it is not therefore necessary to say more than a few words to explain the reasons why I think this appeal ought to be dismissed. Mr. Russell, as one would have expected, has gone to the heart of the case, and the plaintiffs, the present appellants, do not dispute, nor could they dispute, that they must fail if the accommodation referred to, the subject of this inquiry, falls within Part IV. Does it fall within Part IV.? The words of the schedule are as follows: "For any accommodation or services provided or rendered by the company within the scope of their undertaking by the desire of a trader and in respect of which no provisions are made by this schedule." In this case there was accommodation indisputably. Is it accommodation provided within the scope of the company's undertaking? It is a convenience provided in the course of transit on the line to enable delivery to be made at suitable times and in suitable circumstances to the trader. It is not part of the conveyance—indeed, it is an interruption of the conveyance. It is not a terminal charge, but is in my opinion a charge "within the scope of their undertaking" as being ancillary to conveyance and delivery. Is it then provided by the desire of the trader? I think so, and none the

less that it is also provided at the desire of other traders who wish for the same facilities. Is it accommodation "in respect of which no provisions are made by this schedule"? It is not suggested that it is provided for elsewhere in the schedule, and accordingly it seems to me to come quite clearly within the words of Part IV.

I have the satisfaction of knowing that under the decision in this case the company will still be entitled to claim such reasonable sum as the company may think fit in any case, and I think that is what was intended by the provisions under consideration.

LORDS ASHBOURNE, MACNAGHTEN, and JAMES OF HEREFORD concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 16, 1908.

Solicitors: *Beale & Co.; L. H. Falck.*

[HOUSE OF LORDS.]

LONDON AND INDIA DOCKS COMPANY. APPELLANTS;

AND

THAMES STEAM TUG AND LIGHTERAGE COMPANY, LIMITED . . . . . RESPONDENTS.

Ship—Dock Company—Exemption from Dock Rates—Lighter—"Bona fide engaged in discharging or receiving Goods to or from on board of a Ship"—West India Docks Act, 1831 (1 & 2 *Will.* 4, *c. lii.*), *s.* 83.

By s. 83 of the West India Docks Act it was enacted that "all lighters and craft entering into the said docks, basins, locks or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates so long as such lighter or craft shall be bona fide engaged in discharging or receiving such ballast or goods as aforesaid, and also all such ballast or goods so discharged or received shall be exempt from any rate or charge whatever." Sect. 76 gave the dock company power to take in respect of

H. L. (E.)
1908
LONDON AND INDIA DOCKS COMPANY v. THAMES STEAM TUG AND LIGHTERAGE COMPANY, LIMITED.

every lighter, barge, or craft entering into any of the docks such reasonable rate (not exceeding a specified amount) as the directors should from time to time appoint.

Two lighters entered the docks with goods for the purpose of discharging them into a vessel lying in the docks, but, owing to the vessel being unable from want of space to receive the goods, left the docks without being able to discharge:—

Held (by Lord Loreburn L.C. and Lords Macnaghten, Robertson, and Collins, Lords Ashbourne and Atkinson dissenting), that according to the true construction of s. 83 the lighters were not exempt from the payment of rates.

Decision of the Court of Appeal, [1908] 1 K. B. 786, reversed.

THE question raised by this appeal was whether the appellants could recover certain rates claimed from the respondents in respect of two lighters of the respondents entering the appellants' docks. No question arose as to the reasonableness of the rates if the respondents were held not exempt under the circumstances stated in the head-note and in the judgments in this House. The county court judge entered judgment for the respondents, and this decision was affirmed on the ground that they were exempt by the King's Bench Division (Kennedy and A. T. Lawrence JJ.) and by the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.). Hence this appeal.

March 3. *Sir R. Finlay, K.C.*, and *J. A. Hamilton, K.C.* (*George Wallace* with them), for the appellants.

Scrutton, K.C., and *Cranstoun*, for the respondents.

The House took time for consideration.

July 23. LORD LOREBURN L.C. My Lords, the respondents' two lighters, the *Clarence* and the *Pike*, entered the dock with goods intended to be discharged into the steamship *Umfuli*, which was then lying in dock. By no fault of the lighters the *Umfuli* was unable to receive the goods, and so, after some waiting, the lighters left the dock quite untouched. Thereupon the dock company claimed payment of dock dues or rates, and the answer, which prevailed, is that under the circumstances both lighters were exempt from rates by virtue of s. 83 of the West India Docks Act, 1831. This appeal depends upon the true

construction of that section. I think the better course is to begin by stating what in my opinion is the true construction of s. 83.

It occurs in one of a series of Acts providing for the building or management of docks on the Thames. When these docks were built they were, of course, authorized to charge tolls or rates on vessels using them. But as the business of the river had largely been carried on by ships discharging into or receiving in stream from lighters which used the stream free, some provision was made to prevent these lighters being charged for rendering a like service in the docks. That is the origin of s. 83.

When this privilege of exemption was granted it became necessary to safeguard it against abuse, and there were two obvious sources of abuse. Lighters having no actual business in the docks might enter for convenience or in the expectation of getting business, and so crowd up its limited water space, or lighters having entered and done their business might loiter for convenience or in the expectation of getting further business. To prevent these things, while giving the exemption, was in my opinion the object of s. 83.

That section lays down, to begin with, a condition. In order to claim any exemption whatever the lighter must enter the dock to discharge, or receive, to or from "any ship or vessel lying therein." I think that means "lying therein" at the time of the lighter's entry; otherwise the words are redundant, for every ship loaded or discharged in the dock must be lying therein at the time of receipt or discharge, and it was not necessary to say so if nothing more than that was intended. And I can see the motive of requiring that the ship should be in dock when the lighter entered. It was designed to prevent a lighter enjoying any exemption at all if she entered too soon. Further, I think the words "any ship or vessel" denote the plural. The lighter may enter to serve two or more vessels. The section does not say that there must be a contract made with any of them before entry. It is enough if she enters to serve them or any of them specifically. The latter part of the section, to which I now proceed, gives further security against abuse.

Once it is established that a lighter in entering the dock complied with the condition already discussed, she "shall be

H. L. (E.) 1908

LONDON AND INDIA DOCKS COMPANY v. THAMES STEAM TUG AND LIGHTERAGE COMPANY, LIMITED.

Lord Loreburn L.C.

exempt from the payment of any rates so long as such lighter or craft shall be bona fide engaged in discharging or receiving such ballast or goods as aforesaid." She is to be exempt from any rates (that is to say, from all rates), namely, for "entering," "lying therein," or "departing therefrom" (see s. 76), but only during the time specified. I agree with the Court of Appeal in thinking that the words "so long as such lighter or craft shall be bona fide engaged in discharging or receiving" do not mean only while the physical act of discharge or receipt is continuing. No strain upon the language is needed to warrant this conclusion. If a lighter goes into a dock to discharge so many tons of goods, discharges them, and goes out of dock, all the time she spends in this, and any time reasonably spent in waiting her turn, or coming alongside, or the like, is spent upon the business of discharging to a ship lying in dock. It is, in every particle of it, time necessarily spent upon that which is one operation in several stages. The section does not discriminate whether the lighter discharges all that she entered to receive or only part of it. The exemption continues while she is discharging, in the sense already expressed, any part of it. For the words are "engaged in discharging such goods," and that includes a part as well as the whole. But, on the other hand, I am unable to see how the lighter is "engaged in discharging such goods" when from misadventure or mistake or from any cause she does not in fact part with an ounce of goods and leaves the dock as she entered it.

It may be very hard on her, and she may have a remedy against the ship for non-acceptance; or it may be careless of her to have entered without sufficient certainty of being emptied. I really do not know. But in such a case, whatever the cause, no time has in fact been spent in "discharging." If only one ton had been taken out of the lighter, all the time used in going and coming, and so forth, would have been in fact time during which she was engaged in discharging one ton. When nothing was taken out she was engaged in discharging nothing. I cannot bring myself to say that when nothing was taken out she was engaged in discharging goods, either "such goods" or any other; for whatever else goods may be, they are at all events something.

Yet the exemption does not cover any space of time, according to the section, except such time as the barge is so engaged. The same is, of course, true of receiving, but I deal only with the case in hand.

In this case, therefore, of the two barges *Clarence* and *Pike* I am unable to say that they were engaged in discharging. They were engaged in trying to discharge, which is a different thing.

With the greatest respect I think it is making laws, not interpreting them, to hold these lighters exempt. I think the appeal should prevail.

LORD ASHBOURNE. My Lords, with great deference I am unable to concur in the judgment of the Lord Chancellor.

These lighters entered the docks with goods for the admitted definite purpose of discharging them into the ship *Umfuli*, then "lying therein." That ship was unable to take the goods on board, whereupon the lighters proceeded to depart from the dock without any unreasonable delay. Owing to no fault of their own the lighters were not allowed to leave until the next day. Throughout, the action of the lighters was bona fide and correct.

The facts were not in dispute, and the only question for decision by your Lordships is whether the respondents' lighters were exempt from rates under s. 83 of the West India Docks Act (1 & 2 Will. 4, c. lii.), and involves the true interpretation of the words "so long as such lighters or craft shall be bona fide engaged in discharging or receiving such ballast or goods as aforesaid." The appellants urge that they had nothing to do with causing the lighters to enter when they did, or with the loading up of the *Umfuli*, or with her inability to receive any of the goods, and had no knowledge or means of knowledge on the subject, and that consequently the respondents are not within the exemption, and should be regarded as unexempt ab initio.

This, I think, would be a very narrow and unreasonable construction to place upon the section, which was intended to exempt lighters entering the dock for the definite purpose of discharging into a particular ship lying therein, and not staying there any longer than was reasonably necessary.

The right of exemption acquired by the lighters on entering

H. L. (E.) 1908

LONDON AND INDIA DOCKS COMPANY v. THAMES STEAM TUG AND LIGHTERAGE COMPANY, LIMITED.

was not in my opinion lost by the refusal of the *Umfuli* to take the goods, and the right of free departure remained. The refusal of the *Umfuli* was unexpected, and there is nothing to shew that it could have been reasonably anticipated. I therefore think that the appeal should be dismissed with costs.

LORD MACNAGHTEN. My Lords, I only wish to say that I entertain considerable doubts as to the construction of the bargain embodied in this Act. My doubts are not so strong, nor is my view as to the construction so clear, as to justify me in dissenting from the motion proposed by the Lord Chancellor.

LORD ROBERTSON. My Lords, I agree with the Lord Chancellor.

LORD ATKINSON. My Lords, in this case I have the misfortune to differ from three of the noble Lords who have preceded me, and, as I understand, from the one who is about to follow me, in the conclusion at which they have arrived. That fact necessarily shakes—if, indeed, it does not completely shatter—any confidence I might have had in the correctness of the opinions I have formed. Yet, as I do dissent, though I have striven to concur, it is right, I think, that I should state shortly the reasons why I dissent.

I agree that the words in s. 83, "lying therein," apply to a ship lying in the docks at the time of the entry of the lighter. I would point out, however, that the sum sought to be recovered in this action—6*d.* per ton on the tonnage of each of the lighters, the *Clarence* and *Pike*—is the maximum which could be charged for the three operations of entering into the docks, lying in them, and departing from them, if these vessels never enjoyed any privilege of exemption from rates or dues at all. They are treated as if the exemption had never existed, or had been absolutely forfeited. Again, it is not and cannot be contended that s. 83 of the statute is to be strictly construed. The exemption only applies in terms to the operations of discharging or receiving cargo or ballast. The words are "shall be exempt from the payment of rates so long as such lighter or craft shall be bona fide engaged in discharging or receiving such ballast or goods as

aforesaid." So that a lighter, if sense is to be made of the section, must be held to be bona fide engaged in discharging, not only while her crews are making all reasonable and proper preparations for the physical transfer of her cargo to the ship, but during all reasonable delays and intermission in that operation, and also while she is entering the docks to discharge, and departing from them after her physical discharge has been completed. It is only by a stretch of language that a ship can be said to be engaged "in discharging her cargo" while she is leaving a dock without any cargo, after the cargo she carried has been in fact transferred to another vessel, yet it is not disputed by the appellants that the language of this section must, in order that it may not receive an interpretation which would defeat its obvious purpose, be so stretched.

But while the appellants admit that violence must thus far be done to the language of the section in this direction, they insist that its language cannot be stretched in another direction to effect a similar purpose, and that it is not to be read as if its words were "bona fide engaged in discharging or endeavouring to discharge" instead of "bona fide engaged in discharging." The reason given for this contention is, as I understand it, this: that the physical discharge of the cargo is the main and central thing to be accomplished; that all the other operations are merely ancillary to this, the main one, or consequent upon it; and that, however earnest the desire, or vigorous and sustained the efforts, of the crews of these lighters to accomplish this physical discharge, the character and quality of all the preliminary and subsequent operations is changed the moment they fail to effect this purpose in whole or in part; that the acts which, when done before the failure, were acts done while the lighter was "engaged in discharging" cease altogether, by reason of that failure, to be acts done in the operation of discharging the vessel.

With all respect, that appears to me to amount to interpreting this enactment in a sense which tends rather to defeat than to further the object and intention of the Legislature in passing it—a sense which, to use the words of Lord Coke, neither tends to suppress the mischief nor advance the remedy. For it was stated in argument, and not, as I understood, disputed by the

H. L. (E.) 1908

LONDON AND INDIA DOCKS COMPANY v. THAMES STEAM TUG AND LIGHTERAGE COMPANY, LIMITED.

Lord Atkinson.

appellants, that lighters were, before these docks were built, privileged, without paying any dues or tolls, to approach ships lying in the river, get alongside them, discharge cargoes into them or take cargoes from them, and depart on their proper business, and that no such dues were demanded or could be demanded from them if, without default on their part, the discharge of the cargoes was, from any cause beyond their control, entirely prevented. This privilege was absolute, not conditional. It was not to be exercised at the peril of the owners being mulcted in dues if the operations it covered were rendered abortive. The failure to accomplish the main work did not operate by relation back—somewhat on the trespasser ab initio principle—to strip the earlier preparatory proceedings of the privilege which prima facie attached to them at the time they took place, as it is contended it works in this case. It was also stated in argument by the respondents, and, as I understood, not contested, that sections similar to the 83rd have for many years been introduced into all the statutes dealing with docks on the river Thames. They are styled "the free water clauses," and are designed to secure to the owners of lighters, as regards ships lying in those docks, privileges similar to and co-extensive with those they enjoyed in the case of ships lying in the river, so far as the altered physical conditions and the due and reasonable conduct by the docks company of the business they were incorporated to carry on would permit.

The abuses which the statute of 1831 was meant to guard against are, I think, the entry without payment of dues of lighters into the docks, (1.) to tout for business, (2.) to await the arrival of vessels from or into which cargo was to be discharged by them, (3.) to lie in the docks for shelter or convenience, or (4.) to loiter there after they had done the work for which the entry had been effected. By no stretch of language can the movements or operations of the *Clarence* and *Pike* on this occasion be, in my view, reckoned amongst abuses such as these. The entry of the lighters into the docks and the arrangements made bona fide for the purpose for which it is conceded they were made were prima facie within the privilege. No tolls or dues could at the time they took place have been demanded from these vessels in respect

of them. It is no doubt true that, when a certain act is authorized to be done or is covered by a privilege, every step reasonably necessary to effect it or necessarily consequent upon it is impliedly authorized or privileged as the case may be, but I think, in holding that the privilege conferred upon the owners of lighters under this statute is altogether forfeited in the manner contended for, the nature and extent of the privileges designed to be preserved and the abuses sought to be corrected must to a great extent be put out of view.

In the case of *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1) Lord Blackburn thus expresses himself: "The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject-matter with respect to which they are used and the object in view." It is, in my view, plain that the subject-matter of this section was the right or privilege theretofore enjoyed by lighters to discharge cargo or ballast to or from ships lying in the river without payment of tolls, and without the risk of forfeiture of that privilege, while in no default themselves, if they were interrupted in any part of their operations. I think it is equally clear that the object of this statute was to preserve and protect this privilege as far as the altered circumstances would permit, and that it was never designed to attach to it a condition or import into its exercise a risk theretofore unheard of and unknown.

The intention of the Legislature, however obvious it may be, must, no doubt, in the construction of statutes, be defeated where the language it has chosen to use compels to that result, but only where the language compels to it. In the present case, every abuse meant to be corrected can be corrected without conferring on the docks company the right they claim. It is a right which trenches upon what was an ancient privilege, and it certainly appears to me to be unreasonable in its nature as well as oppressive in its exercise, and unneeded for the legitimate conduct of the appellants' business. It leaves to the lighter

(1) (1877) 2 App. Cas. 394, at p. 412.

H. L. (E.) 1908

LONDON AND INDIA DOCKS COMPANY v. THAMES STEAM TUG AND LIGHTERAGE COMPANY, LIMITED.

Lord Atkinson.

owners but the sorry remnant of the rights they formerly enjoyed, and causes the so-called free water clauses to fail of their purpose to a large extent.

For these reasons I have come to the conclusion that, having regard to what s. 83 was designed to preserve and what to prevent, it is permissible to construe its loose and unscientific language as if the words "bona fide engaged in discharging or in preparing or endeavouring to discharge" were used in it instead of the words "bona fide engaged in discharging." I am therefore of opinion that the decision of the Court of Appeal was right and that the appeal should be dismissed with costs.

LORD COLLINS. My Lords, I agree with the Lord Chancellor.

Order of the Court of Appeal reversed with costs here and below.

Lords' Journals, July 23, 1908.

Solicitors: *E. F. Turner & Sons; Keene, Marsland, Bryden & Besant.*

[HOUSE OF LORDS.]

H. L. (E.)
1908
July 23

LONDON AND INDIA DOCKS COMPANY . APPELLANTS;

AND

McDOUGALL & BONTHRON, LIMITED . RESPONDENTS.

LONDON AND INDIA DOCKS COMPANY . APPELLANTS;

AND

PAGE, SON & EAST, LIMITED . . . . RESPONDENTS.

Ship—Dock Company—Construction—Exemption from Dock Rates—Lighter—"Bona fide engaged in so discharging or receiving Goods or Ballast to or from on board of any Ship or Vessel lying therein"—London and St. Katharine Docks Act, 1864 (27 & 28 *Vict. c. clxxviii.*), *s.* 136.

By the London and St. Katharine Docks Act, 1864, c. clxxviii., s. 136, lighters entering the docks to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates so long as the lighter is bona fide engaged in so discharging or receiving the ballast or goods.

Under this section a lighter is engaged in discharging or receiving not merely while the goods are being removed, but also during her entrance to the dock, her departure from it, and any other operation reasonably required in order that she may discharge or receive. But she is not exempt if she is in the dock when her presence is not reasonably necessary for the operations.

Decisions of the Court of Appeal, [1908] 2 K. B. 175, reversed.

THESE two appeals were heard together with *London and India Docks Co.* v. *Thames Steam Tug and Lighterage Co.* (1) All turned upon the construction of special Acts. The facts are stated in the several judgments.

March 3, 5. *Sir R. Finlay, K.C., J. A. Hamilton, K.C.*, and *George Wallace*, for the appellants.

Scrutton, K.C., and *Cranstoun*, for the respondents.

The House took time for consideration.

McDOUGALL & BONTHRON'S CASE.

July 23. LORD LOREBURN L.C. My Lords, in this case the lighter *St. Thomas* entered the St. Katharine Dock on Friday,

(1) Ante, p. 15.

H. L. (E.)
1908
LONDON AND INDIA DOCKS COMPANY v. MCDOUGALL & BONTHRON, LIMITED.
LONDON AND INDIA DOCKS COMPANY v. PAGE, SON & EAST, LIMITED.
Lord Loreburn L.C.

November 24, in order to discharge hemp into the steamship *Pladda*, then lying in the dock. The discharge was completed by 5 P.M. on the 25th. The lighter might have gone out of dock at any time after 9.30 P.M. that night until 1.30 A.M. on the Sunday morning. She preferred to remain till the Monday morning, and was not then allowed to leave the dock until she had paid 1*l.* 10*s.* 6*d.*, being the dock tonnage rate appointed for lying in and departing from the dock. I think it is clear, and Walton J. so found, that this lighter remained in the dock longer than was necessary for the duty she owed to the *Pladda*.

I will not cite the various sections. They have been subjected to a very penetrating scrutiny by the learned judges in the Court of Appeal, and repetition tends to confuse. The charge of 1*l.* 10*s.* 6*d.* was imposed by virtue of rule III. of the third class—power to impose it is given by s. 132 of the London and St. Katharine Docks Act, 1864, which allows of a "reasonable rate." And that this rate is reasonable if it be lawful best appears from the fact that no judge has hinted the contrary. But it is said that the rate is not lawfully claimed.

First it was argued that s. 136 of the Act of 1864 exempted the *St. Thomas* from any rate at all. I do not think so. That section exempts a lighter only "so long as the lighter or craft is bona fide engaged in so discharging or receiving the ballast or goods." "So discharging" covers discharging into any vessel lying in the dock at the time the lighter entered, and to discharge into which she entered the dock. And the lighter in the present case did enter in order to discharge into the steamship *Pladda*, which was there lying in the dock. But did she spend all her time in the dock "bona fide engaged in so discharging"? Not so in my opinion. I agree that a lighter is engaged in discharging not merely while the goods are being removed, but also during her entrance to the dock, her departure from it, and any other operation reasonably required in order that she may discharge. It is one single piece of business in several stages. So long as the *St. Thomas* kept to that piece of business she was exempt from the payment of any rates. When she stayed on in the dock instead of leaving it in the night of November 25-26 she

ceased to be "bona fide engaged in discharging," and I think her exemption ceased also. She became and continued from that moment liable for rates both for lying in and departing from the dock. I think you can treat the departure as part of the business of discharging only when it is in fact part of that business. And it is not so if it is separated from the actual work of discharge by an unnecessary interval. It can be so only when it is a stage in the operation.

Next it was argued that the rate was bad because, according to s. 57 of the Working Union Act of 1888 (51 & 52 Vict. c. cxliii.), the rate must not exceed the rates specified in part 1 of the schedule to the East and West India Dock Company's Extension Act, 1882. And it is said this rate does so exceed. The incriminated rate is a combined rate for lying in the dock and for departing therefrom. One charge of 6*d.* per ton is made for both, if the lying therein does not exceed a week. If this rate were for lying in the dock alone it would exceed the schedule rate. But it is for departure also. There is no schedule rate for departure.

In these circumstances I cannot see that the schedule rate has been exceeded. Comparing the one with the other, it cannot, in my opinion, be said that more is exacted by the company for either one or two services than is prescribed by the schedule for the same one or two services. The company may charge for departing as well as for "lying therein." I see no reason why the company may not make a combined charge for both. The rate made is not impugned for not being "reasonable." It is impugned for being in excess of a schedule rate, and I find no schedule rate with which to compare it, though I do find a schedule rate to compare with one of the two charges which go to make it up. I cannot in these circumstances say that the rate is in excess of the schedule.

Accordingly I think the appellant company were within their rights in claiming the money in question, and that, therefore, this appeal must be allowed.

LORD ASHBOURNE. My Lords, the question in this case is whether the appellants under their statutory powers were

H. L. (E.) 1908

LONDON AND INDIA DOCKS COMPANY v. MCDOUGALL & BONTHRON, LIMITED.

LONDON AND INDIA DOCKS COMPANY v. PAGE, SON & EAST, LIMITED.

entitled to payment of their ordinary tonnage rate on the defendants' barge *St. Thomas* for using the appellants' St. Katharine Dock.

In my opinion the privilege gained by the entry ceased with undue delay. I concur with Fletcher Moulton L.J. as to the legality or amount of the rate, which, under the circumstances, I regard as reasonable. In my opinion the appeal should be allowed with costs.

LORDS MACNAGHTEN, ATKINSON, and COLLINS concurred.

LORD ROBERTSON agreed with the judgment of the Lord Chancellor.

PAGE, SON & EAST'S CASE.

LORD LOREBURN L.C. My Lords, the facts of this appeal are short. On November 23 the lighter *Jew* entered the Albert Dock to discharge into the steamship *Matiana*, then lying in the dock. No part of this discharge was effected, through no fault of the lighter. Had she pleased the *Jew* might have quitted the dock on, at latest, the evening of Saturday, November 25. In fact she remained on till the morning of Monday, November 27, and then received orders to discharge into the *Somali*, which arrived in dock about midday on that 27th of November. She discharged into the *Somali*, finishing on December 5. After that she still remained in dock, receiving cargo from two other ships, and only quitted the dock on December 20; but nothing seems to turn on that. In these circumstances the dock company demanded a rate of 6*d.* per ton, which they explained to be a charge "for entering the Royal Albert Dock, and for lying therein earlier than one tide before the arrival of the *Somali*, into which vessel her freight was discharged." The lighter claimed exemption under s. 136 of the London and St. Katharine Docks Act, 1864.

It is unnecessary to say more in regard to that section, the construction of which was involved in McDougall & Bonthron's case. If the view I ventured to express in that case was well founded, it follows that the rate upon the *Jew* was properly

demanded. When she entered on November 23 she did so with the purpose of discharging into the *Matiana*, and so complied with the condition without which she could have no exemption. But she did not discharge into the *Matiana*, and accordingly there was no point or space of time during which she was exempt from any rate. Several reasons go to shew that her business dealing with the *Somali* did not exempt her. She did not enter in order to discharge into the *Somali*. The *Somali* was not in dock when the *Jew* entered it. And, quite apart from those reasons, the rate claimed was due before the *Somali* entered the dock at all. At that time the *Jew* had already been four days in dock without any protection from the rate. Accordingly I think this appeal should be allowed.

LORD ASHBOURNE. My Lords, the matter to be decided in this appeal is the right of the appellants under their statutory powers to demand a certain dock rate from the respondents' barge the *Jew* in the circumstances of its use of the appellants' Royal Albert Dock.

The facts and dates in the case are undisputed and can be shortly stated. On November 24, 1905, the *Jew*, laden with machinery intended for the *Matiana*, entered the dock. None of the *Jew's* cargo was discharged into the *Matiana*, which had no room for it and sailed on the 25th. The *Jew* did not leave the dock, but remained with its cargo waiting for orders. On the morning of Monday, November 27, it was ordered by the respondents to deliver its cargo to the steamship *Somali*, which was to arrive that day, and which did arrive at noon accordingly. The *Jew's* cargo was discharged into the *Somali*, being finished on December 5, when she was employed to unload and fill from two ships laden with timber, finishing on December 19.

The appellants' powers of charging rates are contained in ss. 132, 133, and 136 of the London and St. Katharine Docks Act, 1864, with the limits presented by s. 57 of the Act of 1888 and the schedule therein referred to. I need not repeat these sections or schedule, which were so often mentioned in the arguments.

The case turns on the construction of s. 136 and the meaning

H. L. (E.) 1908

LONDON AND INDIA DOCKS COMPANY v. MCDOUGALL & BONTHRON, LIMITED.

LONDON AND INDIA DOCKS COMPANY v. PAGE, SON & EAST, LIMITED

Lord Ashbourne.

to be given to "ship or vessel lying therein." The words are not, I believe, to be found in the earlier Acts, and they must have been intended to have some operative meaning. If they are regarded as descriptive they do not add anything to the meaning or construction of the clause and would be simply redundant. I think it is a sounder view to hold that they were intended to convey in themselves a limitation, requiring the presence of the ship at the time of entering, and that they would not be satisfied by attaching them to any later period.

The *Matiana* period is not in controversy, but it is manifest that the *Jew* could readily have departed on the 25th. In dealing with rights one cannot speculate upon the convenience or inconvenience of the *Jew* departing after the *Matiana* and then making a fresh entry for the *Somali*. The *Jew* was exempted from entry for the *Matiana*, a vessel "lying therein" on the 24th, but was not legally justified for remaining therein after the 25th, until the *Somali* arrived on the 27th. She remained at the peril of being charged for rates which I think are legally recoverable, and which the appellants may consider are rightly claimed to maintain the control and avoid the crowding of their docks. I see nothing to make the rate invalid. In my opinion the appeal should be allowed, and I concur with the Lord Chancellor.

LORDS MACNAGHTEN, ATKINSON, and COLLINS concurred.

LORD ROBERTSON agreed with the judgment of the Lord Chancellor.

Orders of Court of Appeal reversed with costs here and below.

Lords' Journals, July 23, 1908.

Solicitors: *E. F. Turner & Sons; Keene, Marsland, Bryden & Besant.*

[HOUSE OF LORDS.]

REED . . . . . APPELLANT;

AND

GREAT WESTERN RAILWAY COMPANY. RESPONDENTS.

H. L. (E.) 1908 *Oct.* 29.

Employer and Workman—Accident to Workman "arising out of and in the course of the Employment"—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.

An engine driver in charge of his engine left it and, for a purpose of his own and not in the execution of his duty or in the interest of his employers, crossed a siding. On returning to his engine he was killed by a waggon which was being shunted:—

Held, that the accident did not arise out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897, s. 1.

IN March, 1907, an engine driver employed by the respondents got off his engine, which was standing at Landore, Swansea, and for his own private purpose crossed a siding and received a book from a friend. In returning to his engine he was knocked down by a waggon which was being shunted on the siding and died from the injury. The learned judge of the Glamorganshire County Court was of opinion "that the deceased left his engine properly for the purpose of turning the water crane to his engine, that being down he stepped across one pair of rails to receive a book from the fireman of the goods train, and that such a slight deviation did not render the accident which occurred when he was returning to his engine one that did not arise out of and in the course of his employment," and he made an award in favour of the widow and child of the deceased. The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.) set aside the award on the ground that the accident did not arise out of and in the course of his employment. Hence the present appeal by the widow.

July 16. *C. A. Russell, K.C.* (*Lleufer Thomas* and *John Plews* with him), for the appellant. The accident happened during a

H. L. (E.) 1908 REED v. GREAT WESTERN RAILWAY.

short interval of employment, and there was nothing like "serious and wilful misconduct," which alone can disentitle from compensation: *Johnson* v. *Marshall.* (1) The Scottish decision of *Goodlet* v. *Caledonian Ry. Co.* (2) is precisely in point. There a man met his death after leaving his engine and crossing the line, in the course of which interval he stopped to exchange a few casual words with another person. The accident arose "out of and in the course of the employment"; without the employment it would not have happened. There was no negligence in the momentary absence from the engine, and the man was really employed all the time. The Act must be construed in a popular sense apart from technicalities, as has frequently been explained in decisions of this House: *Powell* v. *Main Colliery Co.* (3); *Fenton* v. *Thorley* (4); *Brintons* v. *Turvey* (5); or, as Holmes L.J. in *Reg.* v. *Clarke* (6) expressed it, "in the sense that naturally suggests itself to men untrained to legal subtleties." The adverse decisions of *Smith* v. *Lancashire and Yorkshire Ry. Co.* (7) and *Lowe* v. *Pearson* (8) were given before the decisions of this House already cited. The question at issue is really one of fact, not of law, and the county court judge has found that issue in favour of the appellant.

Lush, K.C. (*Douglas Bartley* with him), for the respondents. The test is whether the man was engaged in his work or following his own purposes. There can be but one answer. The case is similar to *Hendry* v. *Caledonian Ry. Co.* (9) and to *Callaghan* v. *Maxwell.* (10) There was "a clear deviation from duty," as Mathew L.J. said in *Benson* v. *Lancashire and Yorkshire Ry. Co.* (11) In *Goodlet* v. *Caledonian Ry. Co.* (2) the man was in search of information, a purpose incidental to his work.

C. A. Russell, K.C., in reply. *Callaghan* v. *Maxwell* (10) and *Benson* v. *Lancashire and Yorkshire Ry. Co.* (11) are wholly

(1) [1906] A. C. 409.
(2) (1902) 4 F. 986.
(3) [1900] A. C. 366.
(4) [1903] A. C. 443.
(5) [1905] A. C. 230.
(6) [1906] 2 I. R. 135, 160.
(7) [1899] 1 Q. B. 141.
(8) [1899] 1 Q. B. 261.
(9) (1907) 44 Sc. L. R. 584.
(10) (1900) 2 F. 420.
(11) [1904] 1 K. B. 242.

inapplicable. In the former there was wilful disobedience, and in the latter a deliberate incurring of danger.

The House took time for consideration.

October 29. LORD LOREBURN L.C. My Lords, in this case one Reed, an engine driver in charge of his engine, got down from it when it was at rest and crossed a siding to receive from a friend a book unconnected with his duties. On returning he was knocked down by a waggon then being shunted and killed. The only question in dispute was whether or not the accident which killed him was one "arising out of and in the course of his employment."

I cannot think that it was. I agree that labour is often intermittent. If a man is in the place of his employment and during its hours uses such intervals otherwise than in working, and while doing so is injured by one of the dangers to which the employment exposes him, that may be an accident within the statute. He may be in such case required to be in attendance and in that respect engaged on his duty, though not actually doing work. But here this man was where he was not entitled to be, and was not working, but pleasing himself. It is not that he thereby violated a rule, but that the accident did not arise out of or take place in the course of the employment at all. It took place while for the moment he quitted his employment. No doubt allowance must be made for the habits of business and the Act must be applied reasonably, but in this case I can see no ground for allowing compensation.

LORD ASHBOURNE. My Lords, I entirely concur.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the judgment of the Court of Appeal was right for the reasons given by the Master of the Rolls.

I agree with the Master of the Rolls in thinking that in all these cases it is incumbent upon the claimant to make out that the accident in respect of which compensation is claimed arose out of and in the course of the injured man's employment, not upon the employer to prove the contrary. But here the

H. L. (E.) 1908 REED v. GREAT WESTERN RAILWAY. Lord Macnaghten.

evidence shews that it was for a purpose of his own, and not in the execution of his duty or in the interest of his employers, that the injured man exposed himself to the risk which caused his death. He had been warned against doing the very thing which he ventured to do. He was, of course, wrong in disregarding the injunctions of his employers. But it is not on the ground of misconduct that his dependants are now without remedy. At the time when the accident happened the man was about his own business, not about the business of his employers. For the moment he had put himself outside the area of protection which the Legislature has carefully marked out. The case, in my opinion, is not within the scope of the enactment at all.

I think the appeal must be dismissed with costs.

LORD LOREBURN L.C. My Lords, my noble and learned friend Lord James of Hereford has asked me to say that he agrees in the judgment proposed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, October 29, 1908.

Solicitors: *Metcalfe & Sharpe, for R. T. Leyson, Swansea; R. R. Nelson.*

[HOUSE OF LORDS.]

GREEN . . . . . APPELLANT;

AND

NEWPORT UNION . . . . . RESPONDENTS.

STEAD . . . . . APPELLANT;

AND

NEWPORT UNION . . . . . RESPONDENTS.

H. L. (E.)
1908
July 7, 13; *Nov.* 11.

Poor Rate—Rateable Value—Necessary Expenses to command Rent—Rent-Charges imposed for Protection of Land from Sea—Parochial Assessment Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

In a district under the statutory jurisdiction of commissioners of sewers rent-charges were imposed on lands A and B for the maintenance of works necessary to protect the district from incursions of the sea. Some of the lands within the district shared the benefits of this protection, though they were not liable to, and did not contribute towards, the maintenance of the works:—

Held, that upon assessing to the poor rate the tenants of lands A and B they were entitled to a deduction from the rateable value in respect of the rent-charge, or such proportion thereof as was the proper share of lands A and B respectively, on the footing that all the protected lands were taken to contribute rateably having regard to the protection they received.

Decisions of the King's Bench Division, [1906] 2 K. B. 147, and the Court of Appeal, [1907] 2 K. B. 460, reversed.

GREEN, the appellant in the first of these two consolidated appeals, was the tenant of Hill Farm, near Newport, Monmouthshire, of which, as well as of other adjoining property, Eton College were the owners. Under the Caldicot and Wentlooge Level Act, 1884 (47 & 48 Vict. c. cxxxiii.), rent-charges amounting to 280*l.* 8*s.* 7*d.* were payable out of Hill Farm and the other property by Eton College as the owners to the commissioners of the level for the maintenance of sea walls and other works for the protection of the property, and these sums were expended by the commissioners for that purpose. Some of the lands within the level were exempt from rent-charges and liability, and did not contribute towards the maintenance of the sea walls and

H. L. (E.) 1908

GREEN v. NEWPORT UNION.

STEAD v. NEWPORT UNION.

works, but shared the benefit equally with the lands which were not exempt and did contribute. A poor rate having been made upon Green in respect of Hill Farm, he appealed to quarter sessions, and contended that the rent-charges were an expense necessary to maintain the farm in a state to command the rent within the meaning of the Parochial Assessment Act, 1836, and that he was entitled to have the amount of the rent-charges, or a fair proportion thereof (having regard to the extent and annual value of the other property belonging to Eton College within the level which was also subject to the same rent-charges), deducted from the rateable value of Hill Farm.

For the assessment committee it was contended that Green was not entitled to have the amount of the rent-charges or any portion thereof deducted, inasmuch as (*a*) the rent-charges were a charge on landlords only, and not on the tenant, and were not imposed and not applied for the benefit of Hill Farm only, but were imposed and applied by the commissioners for the benefit of (inter alia) lands and other hereditaments in the level which did not belong to Eton College, and were not burdened with any such rent-charge, and were payable irrespective of whether the farm needed protection or not, and might be expended in the execution of works miles away from the farm; (*b*) that the rent-charges were not imposed on and payable by all the properties in the level which were benefited by the works done by the commissioners, but were imposed on some properties only for the benefit not only of the properties burdened therewith, but also for the benefit of other properties not so burdened at all; and (*c*) that consequently the rent-charges were not in whole or in part a deduction authorized by the Parochial Assessment Act, 1836, nor an expense necessary to maintain Hill Farm in a state to command the rent within the meaning of that Act.

No evidence was given as to the portion of the rent-charges which it was contended ought to be deducted from the rateable value of Hill Farm, but it was agreed by the parties that if Green's contention was correct the assessment of the rateable value of the whole of the farm land and buildings should be reduced from 160*l.* 10*s.* to 33*l.* 10*s.*

The Court of quarter sessions held upon the facts that Green

was entitled to have a portion of the rent-charges, namely, 127*l.*, deducted from the rateable value, and they stated a case subject to the question whether they came to a correct determination in point of law; if not, the order was to be quashed or the Court was requested to make such order as ought to have been made by quarter sessions.

A similar case was stated with regard to Moorbarn Farm in the appeal by Stead, subject to a similar question and with a similar result.

The King's Bench Division (Lord Alverstone C.J., Ridley and Darling JJ.) set aside the order of quarter sessions in both cases and confirmed the assessments. These decisions were affirmed by the Court of Appeal (Cozens-Hardy M.R. and Buckley L.J., Vaughan Williams L.J. dissenting). Hence these appeals.

July 7, 13. *Macmorran, K.C.*, and *S. R. C. Bosanquet* (*Wrottesley* with them), for the appellants. The rent-charges imposed by the Act are a necessary expenditure to keep the land in a condition to command the rent paid. The sea wall protects this land and all the land in the level from inundations, and the fact that other lands are exempt from the rent-charge is wholly irrelevant; this outlay is none the less necessary, and ought to be allowed for. *Reg.* v. *Vange* (1) is not adverse to the appellants' contention, the question there being whether there was a beneficial occupation and there being no question of benefit to other lands. In *Reg.* v. *Smith* (2) a fishery rate imposed by a local Act was held to be rightly deducted, as were drainage expenses in *Reg.* v. *Gainsborough Union.* (3) The same principle was applied in *London and North Western Ry. Co.* v. *Harborne Overseers.* (4) The assessable value is the value to the owner, which can only be ascertained by the application of s. 1 of the Act of 1836: *Reg.* v. *Wells.* (5) Unless this allowance is made the same land will be twice taxed.

Ryde and *Corner*, for the respondents. The rent-charges are

(1) (1842) 3 Q. B. 242.
(2) (1885) 55 L. J. (M.C.) 49.
(3) (1871) L. R. 7 Q. B. 64.
(4) (1870) 34 J. P. 644.
(5) (1867) L. R. 2 Q. B. 542.

H. L. (E.) 1908 GREEN v. NEWPORT UNION. STEAD v. NEWPORT UNION.

not an expenditure contemplated by the Act of 1836. They are a burden on the property in the hands of the landlord, in the nature of a mortgage and having no relation to the tenant's occupation. So long as there was an annual varying expense incurred by the owners to exclude the sea, as in *Reg.* v. *Hall Dare* (1), there was some title to deduction. But the recurring peril has passed, and the charge is of the nature of land tax, for which no deduction is permitted: *Rex* v. *Adames.* (2) It is like the compensation levy under the Licensing Act, 1904, which was held not to come within the Act of 1836: *Waddle* v. *Sunderland Union.* (3) The charge is not connected with the occupation of land any more than harbour dues were in *Blyth Harbour Commissioners* v. *Newsham Churchwardens* (4), or the salary of a curate in *Reg.* v. *Inhabitants of Sherford.* (5) The charge would remain whether the land was tenanted or vacant, whether the sea was an ever present danger or had receded.

Macmorran, K.C., replied.

The House took time for consideration.

Nov. 11. LORD LOREBURN L.C. My Lords, the question in Green's appeal is whether or not there should be a deduction from the gross rateable value of the appellant's farm, called Hill Farm, in respect of a certain rent-charge issuing out of the farm, on the ground that it represents "expenses necessary to maintain them (the premises) in a state to command such rent" within the meaning of the Parochial Assessments Act, 1836, s. 1.

A large tract of lands is protected from inundation by a sea wall extending twenty miles or thereabouts and by other works. Formerly, for some reason, only part of those lands were compellable to maintain these works, though all were protected. In 1884 commissioners were entrusted with the duty of maintaining this sea wall with the other necessary works ancillary thereto, and the owners of lands liable to maintain them were required to commute their liability. Eton College, the owners

(1) (1864) 5 B. & S. 785.
(2) (1832) 4 B. & Ad. 61.
(3) [1906] 2 K. B. 899.
(4) [1894] 2 Q. B. 293, 675.
(5) (1867) L. R. 2 Q. B. 503.

of this and another farm similarly situated, commuted their liability by giving to the commissioners a rent-charge of 280*l.* 8*s.* 7*d.* issuing out of this and the other farm; and now the appellant tenant of this farm claims that he is entitled to deduct from the gross rateable value so much of that rent-charge as is appropriate to his own, namely, Hill Farm. In that view quarter sessions agreed. The portion of rent-charge apportioned to Hill Farm is 127*l.*

Let me examine this question to begin with, apart from the difficulty created by the language of the special case. In one sense everything, or nearly everything, spent on the upkeep of the sea wall and works is necessary to maintain Hill Farm in a state to command its rent, for if a hundred yards out of the twenty miles were breached I suppose these and all the other protected lands might be swamped. But where there is community of risk and of effort to overcome it the cost is properly divided, and the share of each hereditament would represent that which is necessary to maintain it in a state to command its rent. So far the case seems clear enough. But then how much is to be deducted? In the present case Eton College pays 280*l.* 8*s.* 7*d.* in respect of two farms, and I will take it, as quarter sessions has found, that 127*l.*—a portion thereof—is the share, as between the two farms, of this appellant's farm. Is the sum of 127*l.* to be considered the share of this farm for rating purposes and to be deducted under the statute as expenses necessary to maintain it in a condition to command the rent?

I do not think it is so necessarily. Inasmuch as a considerable portion of the protected lands contributes nothing, it is manifest that those who do contribute are paying for something more than their own protection. Accordingly, as I understand the findings in this case, the sum of 127*l.* is more than the share of Hill Farm pays for its own protection. But the statute says that the deduction is of the sums necessary for their own protection and no more. In my opinion it follows that the right method of allotting its due share to this and every other hereditament is to ascertain the total paid for the protection by all who do pay and to distribute it among the lands protected. Quarter sessions can determine how the distribution must be made, whether

H. L. (E.) 1908

GREEN v. NEWPORT UNION.

STEAD v. NEWPORT UNION.

Lord Loreburn L.C.

according to acreage or value, or a mixture of the two, or in any other fair way. Of this they are the proper judges and the most competent.

No doubt if this is done a deduction will have to be allowed on those lands which enjoy protection but are exempt from contributing. I cannot see why this should not be so. These exempted lands have somehow acquired rights as against the other lands, whether by purchase or by some other means, in the remote past. They are on that account more valuable to their owners, and the contributing lands are less valuable. But the rating authority is not concerned with that. Rating is a statutory method of raising money from all lands within a prescribed area in proportion to the annual letting value thereof. What the landlord or the occupier puts in his pocket does not signify; nor does it signify what mortgages or rent-charges affect the land. Buckley L.J. states this very clearly, and it is indisputable law. There is the land, to be in imagination let as it is, and its rateable value is to be so fixed after making certain deductions, including deduction for the purpose now in debate.

Therefore, in my opinion, the exempt lands are entitled to the deduction just as much as the contributory lands, though they pay nothing toward the common protection. It follows that this burden ought to be for rating purposes treated as though it were distributed fairly according to the benefit received by all the lands to which that benefit extends. How the several owners may have arranged the business between themselves is immaterial, and the Act merely recognizes pre-existing arrangements. Nor does it signify whether the landlord or the tenant primarily pays the charge. I need not discuss the decisions on that point. Buckley L.J. dealt with them very clearly, and none of them conflicts with the view I present to your Lordships.

If the judgments delivered in the Court of Appeal in this case are considered, they do not in substance differ, as it appears to me, from this opinion. The Master of the Rolls says to the extent to which Hill Farm bears more than its proper share of the rent-charge no deduction can be allowed. Buckley L.J. takes the same ground. Vaughan Williams L.J. goes further, and thinks that in this case there is a right to a deduction.

But the Court held in effect that it was not open to them on the special case as stated to consider any question except the right to deduct the entire apportioned charge, namely, 127*l.*

I agree that, if your Lordships' House is restricted to the mere duty of pronouncing whether or not that entire apportioned rent-charge is to be deducted, the answer must be in the negative, as I understand the findings.

The special case, however, is on this point imperfectly stated. I am not sure that the fault lies with quarter sessions, for it looks to me—and the Lord Chief Justice seems to have thought the same—as if this point of deducting only so much of the rent-charge as was the fair share of Hill Farm itself had been somewhat overlooked.

In these circumstances I think the proper course is to answer the question of quarter sessions by a declaration that the appellant is entitled to a deduction from the rateable value in respect of the rent-charge, or such proportion thereof as is the proper share of Hill Farm, on the footing that all the protected lands are taken to contribute rateably having regard to the protection they receive.

If your Lordships adopt this course it is necessary to reverse the order of the Court of Appeal. But, as I have said, I do not think that Court differs in principle. The order which I recommend to your Lordships merely enables quarter sessions to dispose of the controversy without the necessity of further litigation.

I think each party should bear his own costs here and below.

LORD ASHBOURNE. My Lords, I concur.

LORD COLLINS. My Lords, the question in this case is whether the occupants of certain rateable hereditaments are entitled to a deduction from the gross estimated rental in respect of certain rent-charges charged upon the said hereditaments to meet the expenses of safeguarding the drainage level in which they are situate against the incursion of water from the sea.

I need not refer to the circumstances under which these rent-

H. L. (E.) 1908

GREEN v. NEWPORT UNION.

STEAD v. NEWPORT UNION.

Lord Collins.

charges were created, which are fully set out in the case and judgment below, but it is the fact that prior to the passing of the Caldicott and Wentlooge Level Act, 1884, the burden of maintaining the sea defences in the level was unequally distributed, some lands being exempt from any liability in respect thereof, while the remainder bore the whole expense. In the Court of Appeal Vaughan Williams and Buckley L.JJ. regarded the rent-charges substituted under the Act as not altering the nature of the obligation imposed.

The sessions allowed the deduction claimed, but their decision was reversed on appeal by the Divisional Court presided over by the Lord Chief Justice, whose decision was affirmed by the Court of Appeal, Vaughan Williams L.J. dissenting. It is a somewhat peculiar feature of the case that every judge who heard it was of opinion that the appellants were entitled to some deduction, but that, for technical reasons, it was not open to them to allow it in these proceedings. I am not sure that there is any difference of opinion as to the law regulating the right to make deductions from the gross estimated rental in order to arrive at the net rateable value. The Lord Chief Justice thus states the law: "It cannot be disputed by the appellants that if this were the ordinary case of a tax paid to keep up the bank around this particular hereditament, or this and a number of other hereditaments, if there was a proper apportionment it would be a proper deduction." (1) On the other hand, it is equally clear that if any part of the rent-charge consists of expenses charged on the hereditaments in question for the benefit of other hereditaments, and not of the hereditaments in question, no deduction can be made in respect of these; they are not expenses necessary to maintain the land in question in a state to command the rent, but are due by virtue of a collateral obligation for the benefit of other land. If the rent-charge, as pointed out by Buckley L.J., must be deemed to embrace these two elements, it cannot be all deducted, and unless the case has been so framed as to admit ascertainment and separation of these two elements, there is no alternative but to quash the order of sessions sanctioning the deduction of the whole.

(1) [1906] 2 K. B. 147, at p. 153.

Cozens-Hardy M.R. states his view thus: "It was assumed in argument by both sides that originally all the land in the level, subject to the peril of inundation, must have been liable to contribute to maintain the sea wall and works. The appellant's farm would have to bear its rateable share, and no more, but, under circumstances which cannot now be explained, part of the burden which originally rested on the lands of other people has been shifted on to the appellant's land. This may have been due to some pecuniary bargain, but the result is that the appellant's farm now bears more than its share. It seems to me that to the extent of this addition to its proper share the rent-charge does not in principle differ from a mortgage created by a landowner, in respect of which it is clear that no deduction can be allowed. In the course of the argument we expressed the view that it is not open to us on this appeal to consider any question except the right to deduct the entire apportioned rent-charge. Our decision will leave open the question whether any other sum ought to be allowed by way of deduction. On this ground I think the appeal fails." (1) On the assumptions of fact involved in the judgments cited, I agree in the conclusion of law. But I share Vaughan Williams L.J.'s doubts whether the conclusions of fact have been conclusively established. In order to establish that there is an element in the sum demanded under the rent-charge in respect of the farms in question which cannot properly be deducted, it must, I think, be shewn that that sum is not merely an excess of what would be the share of the farms in question if the expense of maintenance of the sea defences were distributed proportionately over the whole area, but is an excess over the sum necessarily expended to keep the farms in question in a state to command the rent.

Take the case of a farm so situate that it can be protected at an annual cost of 300*l.*, but that this protection enures to the benefit of land further back. It might be equitable that the cost of this protection should be apportioned over all the land protected, but until this has been done the whole cost is necessarily expended to enable the land in front to command the rent, and therefore, according to rating law, can be properly deducted.

(1) [1907] 2 K. B. 468.

H. L. (E.) 1908 GREEN v. NEWPORT UNION. STEAD v. NEWPORT UNION. Lord Collins.

There is no finding in the present case that the land in question was itself protected at any greater cost by reason of the fact that other lands that contributed nothing were incidentally protected also. Therefore, without going so far as Vaughan Williams L.J., and deciding the case on the burden of proof only, I am of opinion that we ought not to decide it at all without further inquiry into the facts.

I accept the view of Vaughan Williams and Buckley L.JJ. that the rent-charge under the Act is not a new charge, but a commutation of a then existing liability.

I am content that the facts should be ascertained by the sessions as suggested by the Lord Chancellor.

LORD LOREBURN L.C. My Lords, my noble and learned friend Lord Macnaghten has asked me to say that he agrees in the opinion which I have expressed in this case.

Order of the Court of Appeal reversed: The question submitted by quarter sessions answered by a declaration that the appellant is entitled to a deduction from the rateable value in respect of the rent-charge, or such proportion thereof as is the proper share of Hill Farm, on the footing that all the protected lands are taken to contribute rateably having regard to the protection they receive: each of the parties to bear his own costs here and below.

LORD LOREBURN L.C. My Lords, the second case, Stead's case, is identically the same, and I propose that exactly the same order should be made mutatis mutandis.

Order of the Court of Appeal reversed, with a similar declaration: Each of the parties to bear his own costs here and below.

Solicitors: *Hallowes, Carter & Ellis; Kinch & Richardson, for Lyndon Moore & Cooper, Newport, Mon.*

[HOUSE OF LORDS.]

BUTTERWORTH AND ANOTHER . . . . . APPELLANTS; H. L. (E.) 1908 *Oct.* 15; *Nov.* 26.

AND

WEST RIDING OF YORKSHIRE RIVERS BOARD . . . . . RESPONDENTS.

Local Government—Public Health—River, Pollution of—Sewer—Person who causes polluting Liquid to flow into Stream—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 7.

Manufacturers caused polluting liquid to flow from their factory into a sewer which discharged into a stream. The sewer existed at the date of the passing of the Rivers Pollution Prevention Act, 1876, and was vested in and under the control of the local sanitary authority. The manufacturers used no means to render the polluting liquid harmless:—

Held that, even assuming that there was a prescriptive right to discharge their polluting liquid into the sewer, the manufacturers had committed an offence under s. 4 of the Act by discharging into a sewer through which the liquid found its way into the stream.

The reasoning in *Kirkheaton Local Board* v. *Ainley*, [1892] 2 Q. B. 274, approved upon this point.

THE West Riding of Yorkshire Rivers Board, acting under the powers of the West Riding of Yorkshire Rivers Act, 1894 (57 & 58 Vict. c. clxvi.), made an application to the county court against the appellants under s. 10 of the Rivers Pollution Prevention Act, 1876, in the following circumstances. The appellants were woollen and worsted manufacturers at the Yew Tree Mills, Holmfirth, in the West Riding, and admitted that polluting liquids were discharged from a dye-house in their mills into a sewer called the mill-drain, and that the sewer conveyed the liquids into a stream called the Stubbin Clough. Evidence was given that this had been done for more than fifty years; also that for many years sewage from houses had been discharged through that sewer into the stream. The learned county court judge held or assumed that the mill-drain was a sewer vested within the Public Health Acts in the local sanitary authority, but, following the observations in *Kirkheaton Local Board* v. *Ainley* (1), where the powers given under s. 21 of the Public Health Act, 1875, were held

(1) [1892] 2 Q. B. 274.

H. L. (E.) 1908

BUTTERWORTH v. WEST RIDING OF YORKSHIRE RIVERS BOARD.

to be no defence to proceedings under the Rivers Pollution Prevention Act, 1876, held that the appellants had committed an offence under s. 4 of the latter Act, and made an order upon the manufacturers to abstain from the commission of the offence within nine months. This order was affirmed by the King's Bench Division (Phillimore and Walton JJ.) and by the Court of Appeal (Lord Alverstone C.J., Sir Gorell Barnes P., and Farwell L.J.), who followed the reasoning in the *Kirkheaton Case*. (1)

Oct. 15. *Sir C. A. Cripps, K.C.*, and *Lowenthal*, for the appellants. This is virtually an appeal against *Kirkheaton Local Board* v. *Ainley*. (1) The offence created by s. 4 of the Rivers Pollution Prevention Act, 1876, is the discharging or permitting the discharge of polluting liquids into a stream. It is no offence by statute or at law to discharge it into a sewer vested in and under the control of a local sanitary authority, which is designed for the purpose of carrying away offensive matter. If the polluting liquid does any injury, that is the default of the sanitary authority. Even if it were not so, the appellants have a complete defence in the fact that by prescription they had acquired an inalienable right to this user of the sewer. There is no modification of that right express or implied in the Act of 1876. Further, by s. 7 of that Act every sanitary authority having sewers under their control must give facilities for enabling manufacturers to carry the liquids proceeding from their factories into the sewers. The proviso in that section as to not admitting liquids prejudicial or injurious does not apply to the present case, there being no evidence that the polluting liquids were prejudicial or injurious within the meaning of that proviso. Therefore both by statute and at law there is no offence committed, there being no discharge caused or permitted by the appellants into the stream; their action or permission being limited to the discharge into the sewer. In the *Kirkheaton Case* (1) the Court of Appeal were of opinion that s. 21 of the Public Health Act, 1875, was no defence in a case where sewage was discharged into a sewer and thence found its way into a stream. That opinion is probably unsound and might be overruled if necessary, but it does not affect the

(1) [1892] 2 Q. B. 274.

present question, which turns not upon the sewage clauses of the Rivers Pollution Prevention Act, 1876, but upon the polluting liquid clauses, which contain different provisions. There is no facilities clause in the Public Health Act, 1875, or in the Rivers Pollution Prevention Act, 1876, with regard to sewage. Sect. 7 of the Act of 1876, which contains the facilities clause, applies only to polluting liquids.

Danckwerts, K.C., and *Jeeves*, for the respondents. The action of the appellants, if not the causa causans, is the causa sine qua non of the discharge into the stream, and there is nothing in the Act to relieve the manufacturer from the consequences of his discharging the liquids into the sewer. Even assuming that the appellants had gained a prescriptive right before the passing of the Rivers Pollution Prevention Act, 1876, they are in no better position. The statute says doing the thing is an offence. It creates the offence, no matter what the precedent rights may have been. The appellants had the remedy entirely in their own hands, but they did not choose to use it. The sewer existed in 1876, at the date of the passing of the Act, and the appellants would have protected themselves against any proceedings if they had shewn to the satisfaction of the Court that they had used "the best practicable and reasonably available means to render harmless the polluting liquid," as pointed out in the second paragraph of s. 4. [They also referred to *Pasmore* v. *Oswaldtwistle Urban District Council.* (1)]

Sir C. A. Cripps, K.C., in reply.

The House took time for consideration.

Nov. 26. LORD LOREBURN L.C. My Lords, an examination of the Rivers Pollution Prevention Act, 1876, has led me to the conclusion that the order before your Lordships ought to be affirmed.

The appellants have for a long time drained their manufacturing refuse into a pipe communicating with a stream. In that way it falls into the stream. Their predecessors constructed the pipe long ago, and permitted sewage from eight or ten houses to

(1) [1898] A. C. 387, 396.

H. L. (E.) 1908

BUTTERWORTH v. WEST RIDING OF YORKSHIRE RIVERS BOARD.

Lord Loreburn L.C.

be discharged into it. Then it became a sewer within the meaning of the Public Health Act, 1875. It is not disputed that the manufacturing refuse is a "polluting liquid."

In these circumstances the respondents, the West Riding Rivers Board (who are entitled to take proceedings under an Act of 1894 to which I need not further allude), summoned the appellants for breach of the 4th section of the Rivers Pollution Act, 1876, in that they "caused and continue to cause to fall or flow and knowingly permitted and still permit to fall or flow or to be carried into a stream," &c., this refuse.

The defence is that the appellants had a prescriptive right to discharge it into the sewer (which I will assume to be true), and that it was then the duty of the local sanitary authority to dispose of it so as not to break the law. They maintain that they did not cause this refuse to flow into the stream within the meaning of the section, because, although it did flow into the stream by gravitation, all they (the appellants) did was to cause it to flow into the sewer, which is under the control of the local sanitary authority, and that they had no responsibility for its ulterior destination. The question raised is, no doubt, of great importance.

The purpose of the Rivers Pollution Prevention Act, 1876, was, as its name denotes, to prevent the pollution of rivers or streams. In the 2nd, 3rd, 4th, and 5th sections are contained prohibitions against introducing (I use a neutral word) into a stream the substances there separately classified. Roughly they may be stated as solid refuse of manufacture, sewage matter (whether solid or liquid), liquid polluting refuse of manufacture, and polluting refuse from mines (whether solid or liquid). Now the thing forbidden to be done in each of these sections is described in the same language (except that there is a slight variation in s. 2): "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream" the substance in question commits an offence.

It is clear to my mind that in regard to sewage matter dealt with by s. 3 these words are intended by the Act to cover a case where a person causes such matter to flow into a channel or a sewer and thence to be carried into a stream. For the

second paragraph of that section and the last paragraph also expressly excuse persons who under specified circumstances so discharge into a channel or sewer respectively. I think this indicates that when the 3rd section speaks of causing to fall or flow or knowingly permitting to fall or flow or to be carried into a stream it refers not merely to a direct discharge, but also to a discharge through some intermediate conduit, whether that be or be not a sewer under the control of a sanitary authority. If that is the meaning of the 3rd section, it will be so also of the 4th section, with which we are here concerned. And indeed the language itself is so wide—so designedly wide, in my opinion—that it would be difficult to apply any more restricted construction, unless, indeed, it were necessary in order to avoid clear injustice or absurdity, which cannot be supposed to have been meant.

Accordingly Mr. Cripps, rightly treating these different though similarly worded sections as reflecting light upon each other, fixed upon s. 3 and argued that an absurdity would follow if this wide construction were placed on s. 3, which relates to sewage matter. Suppose, he said, that a householder whose house drain connects with a sewer finds that the sanitary authority controlling the sewer discharges the sewage into a stream without first deodorizing it; in that case, is the householder guilty of an offence, who is not to blame and indeed has no alternative but to do what he has done? The answer seems to be sufficient, that in such case the householder is excused by the last paragraph of the 3rd section, because he has the sanction of the sanitary authority for so doing. By the Public Health Act, 1875, the householder has a right to do it, and the sanitary authority is compelled to allow him.

When I turn to the 4th section of the Act of 1876, under which the present case arises, and also the 7th section, I find provisions which seem ample enough to prevent any unreasonable treatment of manufacturers. Every sanitary authority is obliged to give facilities for enabling manufacturers to convey their liquid manufacturing refuse into the sewers, provided it be not deleterious in the sense described "or otherwise be injurious in a sanitary point of view."

BIBL. LONDIN

H. L. (E.) 1908

BUTTERWORTH v. WEST RIDING OF YORKSHIRE RIVERS BOARD.

Lord Loreburn L.C.

But even if such refuse be "poisonous, noxious, or polluting," the manufacturer is not guilty of an offence when he causes it to flow into a stream through a channel constructed or in course of construction in 1876, when the Act was passed, and is using the best practicable and reasonably available means to render it harmless. All user existing in 1876 is thus protected on the simple condition that the manufacturer uses the best means to prevent a nuisance.

In the present case the appellants or their predecessors had, I will assume, in 1876, and long before that, a right to discharge their refuse into the conduit they still use, and thence into the stream. But they have not used the best means of making their refuse harmless. Accordingly they have not the benefit of this proviso. I see no hardship in that.

I must add that under the 6th section of the Act of 1876 a further protection is afforded to manufacturers and mine-owners. No proceedings can be taken against them for such an offence as is here charged without the consent of the Local Government Board.

The Board in giving or withholding their consent must have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality. And the Board cannot give its consent in a district which is the seat of a manufacturing industry unless satisfied that means for rendering the refuse harmless are "reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of the industry."

In short, the natural construction of the 4th section seems to me to cover a case where refuse is discharged into a sewer and thence into a stream, and other clauses of the Act indicate that this is its meaning; and I see no injustice or inconvenience such as might lead me to suppose a narrower construction was intended. In this opinion I am confirmed by the decision of the Court of Appeal in the *Kirkheaton Case.* (1)

Accordingly I move your Lordships to dismiss this appeal with costs.

(1) [1892] 2 Q. B. 274.

LORD MACNAGHTEN. My Lords, this appeal was apparently meant to bring under review the decision of the Court of Appeal in the case of *Kirkheaton Local Board* v. *Ainley* (1), a decision pronounced in 1892. The Court then consisted of Lord Esher M.R. and Bowen and A. L. Smith L.JJ. Holding themselves bound by the opinion of those eminent judges as to the meaning and effect of certain expressions in the Rivers Pollution Prevention Act, 1876, the learned judges of the Court of Appeal in the present case affirmed the judgment of the Court below without giving any opinion of their own. The Kirkheaton judgment was concerned with the case of sewage pollution. Here the case is one of manufacturing pollution. In the Act of 1876 the two cases are kept quite distinct and dealt with separately. But it is important to observe that in both the very same language is used to describe the doing of the thing which is constituted an offence by the Act.

The Act of 1876 begins with a preamble, which explains the scope and indicates, I think, the scheme of the Act. It is in these words: "Whereas it is expedient to make further provision for the prevention of the pollution of rivers, and in particular to prevent the establishment of new sources of pollution." The creation of new sources of pollution is prohibited. Existing sources of pollution are to be regulated and reformed.

Such being the purpose of the Legislature, the natural and obvious course to be adopted in framing the Act was the course which the Act itself follows. It declares that, subject to the provisions of the Act, every person who does any of the several things which the Legislature seeks to prevent as being sources of pollution commits a statutory offence. The net is cast widely. But there are checks and restrictions designed to obviate injustice to individuals, and, in the case of manufacturing processes, injury to the industries of the country. The Act is divided into parts. Part I. contains the "Law as to Solid Matters." With that we have nothing to do. Part II., which is comprised in s. 3, is headed "Law as to Sewage Pollutions," and Part III. "Law as to Manufacturing and Mining Pollutions." No proceedings were to be taken under Part II. or Part III. until the expiration of

(1) [1892] 2 Q. B. 274.

H. L. (E.) 1908

BUTTERWORTH v. WEST RIDING OF YORKSHIRE RIVERS BOARD.

Lord Macnaghten.

twelve months after the passing of the Act, and then two months' notice was to be given. As regards sewage pollution, the last clause in s. 3 provides that a person other than a sanitary authority shall not be guilty of an offence under that section in respect of the passing of sewage matter into a stream along a drain communicating with any sewer belonging to or under the control of any sanitary authority, "provided he has the sanction of the sanitary authority for so doing." On this two observations arise. In the first place the enactment shews that the interposition of a sewer is of itself no protection to a person who passes sewage into a stream through the sewer. Then there is the proviso at the end of the clause to be construed. What is meant by "the sanction of the sanitary authority"? Happily it is not necessary to consider that question. For the proviso was practically repealed by the explanatory Act of 1893, which enacts that, "Where any sewage matter falls or flows or is carried into any stream after passing through or along a channel which is vested in a sanitary authority the sanitary authority shall for the purposes of section 3 of the Rivers Pollution Prevention Act, 1876, be deemed to knowingly permit the sewage matter so to fall flow or be carried." And accordingly I find that the West Riding of Yorkshire Rivers Act, 1894, the Act under which the present action was brought, while it repeats the language of the enacting portion of s. 3 omits the proviso altogether. The result of the Act of 1893 is that a person who passes sewage into a sewer vested in a sanitary authority does not commit an offence under Part II. of the Act of 1876 though the sewer communicates with a stream. And it is no longer necessary in any case to suggest or prove the sanction of the sanitary authority.

In dealing with manufacturing pollutions the checks and restrictions are more elaborate. Of these provisions the most important is that contained in the latter part of s. 4. No person running polluting liquid into a stream through a channel in use at the date of the Act is to be held guilty of the statutory offence if he shews to the satisfaction of the Court having cognizance of the case that he is "using the best practicable and reasonably available means" to render the effluent harmless.

Then proceedings are not to be taken against any person under Part III. save by a sanitary authority or without the consent of the Local Government Board. In giving or withholding their consent the Board are to have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality. They are forbidden to give their consent to proceedings by the sanitary authority of any district which is the seat of any manufacturing industry unless they are satisfied after due inquiry that means for rendering the effluent harmless are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry.

There are other provisions for the protection of manufacturers on which I need not dwell. In the last resort, if there are legal proceedings, and those proceedings are successful, a large discretion is given to the judge. I may, however, observe that a certificate of an inspector appointed by the Local Government Board to the effect that "the means used by a manufacturer for rendering the effluent from his works harmless are the best or only practicable and available means under the circumstances of the particular case" is to be accepted in all Courts and in all proceedings under the Act as conclusive evidence of the fact. A certificate to that effect seems to afford complete protection to a manufacturer who is discharging into a stream liquid coming from his works.

The appellants have not taken any means for rendering harmless the effluent from their manufactory, nor do they propose to do so. They rely on a contention which seems to me to be devoid of substance. They say, We pass this poisonous matter into a sewer vested in the sanitary authority of the district; we have nothing more to do with it; if the sanitary authority pour it into a stream they, not we, are guilty of an offence against the statute. That seems to me to be an idle contention. If a person sets in motion poisonous liquid in a course and direction which must take it into a stream, the person who sets the liquid going causes it to flow or fall into the stream, whether it passes through a conduit vested in somebody else or not. That was the opinion of the learned judges in the *Kirkheaton*

H. L. (E.) 1908

BUTTERWORTH v. WEST RIDING OF YORKSHIRE RIVERS BOARD.

Lord Macnaghten.

Case. (1) It seems to me to be a self-evident proposition, though it does not appear to have met with universal acceptance, owing, I think, at least in some measure, to an erroneous opinion which prevailed at one time that under the Public Health Act, 1875, manufacturers had the right of pouring their refuse into the sewers of the local sanitary authority.

Then a point was made in argument of the fact that the appellants had, as was alleged, acquired a prescriptive right to use the sewer. I must confess I could not quite follow the argument. It was not contended that a prescriptive right of fouling a stream could be of any avail against an Act of Parliament which says that nobody shall foul a stream in future. And I have a difficulty in seeing how an indefeasible right of passage through a sewer for such liquids as may be lawfully passed into a stream can be an excuse for passing into the stream offensive liquids which nobody is allowed to put there. Some argument, too, was raised on s. 7, which is in Part IV. That section enacts that every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers to drain into their sewers. I have some difficulty in seeing what this section has to do with the question before your Lordships. The appellants neither asked for nor obtained any facilities from the sanitary authority of the district for admittance to their sewers. And it seems to me that if they had obtained such facilities and poured into the sewer poisonous liquid so as to flow into a stream, there is nothing in the Act to relieve them from the consequences of having committed an offence under Part III.

I think the appeal must be dismissed with costs.

Lord Robertson. My Lords, I think that this appeal fails, but my judgment is rested on a narrower ground than has been adopted in the Courts. The first point to be remembered is that this is a case not of sewage, but of manufacturing liquids; and it is necessary to see by what right the appellants get their liquids into the sewer. Now the appellants have, not avowedly but actually, put forward two inconsistent theories. They say,

(1) [1892] 2 Q. B. 274.

first, that they have put their liquids into the sewer for fifty years, and they claim, therefore, to have a prescriptive right to do so. This, then, is a right as against the local authority in invitos. The other theory is that, as de facto the liquids get into the sewer, the local authority must be held to have granted facilities in the sense of s. 7 of the Act. It seems to me that, as matter of historical fact, there has been no grant of facilities, and that, whether there be a prescriptive right or not, the local authority has been entirely passive. It results that the appellants are not in the position of having the local authority interposed (as it were) between them and the stream, as the active recipients and transmitters of the liquids, and the result is that in my opinion they are liable just as if they directly sent this stuff into the stream.

In adopting this ground of judgment I dissociate myself from the doctrine that a person who sends his household sewage into the sewer is liable because the local authority empties the sewer into a stream. The local authority is the appointed collector, recipient, and disposer of household sewage, and in my opinion the responsibility of the householder ends when he delivers his stuff into the sewer.

Lord Loreburn L.C. My noble and learned friend Lord Collins agrees with the conclusion at which your Lordships have arrived.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 26, 1908.

Solicitors: *Van Sandau & Co., for Mills & Co., Huddersfield; Clements, Williams & Co., for H. F. Atter, Wakefield.*

The following opinion was not delivered in the House owing to the absence of Lord Collins :—

Lord Collins. My Lords, the injunction is here sought by the West Riding Rivers Board under statutory powers. I agree with the Court of Appeal that the reasoning in the *Kirkheaton Case*(1), which related to sewage, applies equally to manufacturing

(1) [1892] 2 Q. B. 274.

H. L. (E.) 1908

BUTTERWORTH v. WEST RIDING OF YORKSHIRE RIVERS BOARD.

Lord Collins

pollution, which is the subject of complaint in the present case under s. 4 of the Rivers Pollution Prevention Act. The defendants, therefore, having caused the polluting liquid to flow into a stream, are to be deemed to have committed an offence against the Act unless they shew to the satisfaction of the Court that they are using the best practicable and reasonably available means to render harmless the polluting liquid so carried into the stream. It is not suggested that they have used any means at all to carry out that object, and therefore, so far as the section deals with the matter, they stand unprotected. They have therefore sought their justification outside the section itself. Their defence is that they had acquired a prescriptive right to pass their effluent into the sewer through which it finds its way into the stream, and that once having passed it rightfully into the sewer they are not responsible for what becomes of it. They vouch in support of this position s. 21 of the Public Health Act, 1875, which entitles an owner or occupier of premises within the district of a local authority to cause his drains to empty into the sewers of that authority. But this is in effect the same argument which was rejected by the Court of Appeal in the *Kirkheaton Case* (1) above cited, and they accordingly ask this House to disregard the opinions of the three learned judges who decided that case. It is true that the case did not technically decide that point, since the injunction was refused, but the opinions of the three judges were clear upon the point that the defendants' liability was unaffected by the fact that the sewer authority might also have committed an offence in knowingly permitting the effluent to be carried into the stream. I can see no reason to question the view of the learned judges who decided that case. The words of the Rivers Pollution Prevention Act which create the offence are express and cover the causing and the knowingly permitting the flow of the noxious liquid into the stream. Neither does the interpretation seem unreasonable when it is remembered that when the pollution flows along a channel constructed as in this case and the one referred to, no offence is committed if the best practicable and reasonably available means have been taken to render harmless the polluting liquid, and, further, in the case of sewage

(1) [1892] 2 Q. B. 274.

caused by a person other than a sanitary authority to flow along a drain communicating with a sewer belonging to or in the control of any sanitary authority, and thence into a stream, no offence is committed if he has the sanction of the sanitary authority. The prescription, even if it could at common law justify a public nuisance, which apparently it could not (1), certainly can avail nothing against a statute.

In my opinion the appeal should be dismissed.

[HOUSE OF LORDS.]

LOCAL GOVERNMENT BOARD . . . . APPELLANTS;

AND

SOUTH STONEHAM UNION . . . . . RESPONDENTS.

Local Government—Poor Law—Dissolution of Union—Uniting of Parishes—Consent of Guardians of Union—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict.* c. 61), *s.* 11—*Poor Law Amendment Act*, 1844 (7 & 8 *Vict.* c. 101), *s.* 64.

Under the Divided Parishes and Poor Law Amendment Act, 1876, the Local Government Board has power to dissolve any union, whether formed under a general or a local Act.

The consent of the guardians of a union is not required to the uniting of a parish with other parishes under s. 64 of the Poor Law Amendment Act, 1844. The consent required concerns only the guardians of the parish, where there are such guardians.

Decision of the Court of Appeal, [1908] 2 K. B. 368, reversed and decision of the King's Bench Division restored.

AN order of the Local Government Board in January, 1908, provided (1.) that a union formed under a local Act of 13 Geo. 3, c. 1, should be dissolved; (2.) that two parishes should be separated from the South Stoneham Union; (3.) that certain parishes should be united for the administration of the laws for the relief of the poor and should form a union to be termed the Southampton Union.

The guardians of the poor of the South Stoneham Union objected that the first provision was invalid on the ground that

(1) See *per* Lord Ellenborough, *R.* v. *Cross*, (1812) 3 Camp. at p. 226.

H. L. (E.) 1908

LOCAL GOVERNMENT BOARD v. SOUTH STONEHAM UNION.

s. 11 of the Divided Parishes and Poor Law Amendment Act, 1876, applied only to general Acts and not to local Acts, and that the local Act 13 Geo. 3, c. 1, created for ever a corporation of guardians which the Local Government Board had no power to dissolve and which had exceptional powers of rating. They also objected to the third provision on the ground that the parish of St. Mary (one of the parishes united under that provision) had more than 20,000 inhabitants, and that the consent of the guardians had not been obtained as required by s. 64 of the Poor Law Amendment Act, 1844.

The King's Bench Division (Lawrance, Darling, and Walton JJ.) overruled both objections. The Court of Appeal affirmed that decision as to the first objection, but reversed it as to the third. Hence this appeal.

Oct. 19, 20. *Sir S. T. Evans, S.-G.*, and *Macmorran, K.C.* (*Rowlatt* with them), for the appellants. As to the first objection, the Local Government Board have under s. 11 of the Divided Parishes Act, 1876, full power to dissolve any union, however formed, and that section is conclusive of the whole matter. [They cited *R.* v. *Whitechapel.* (1)] As to the other objection, s. 64 of the Act of 1844 deals only with the case of a parish having its own board of guardians and has no application to the guardians of a union.

Avory, K.C., and *S. H. Emanuel*, for the respondents. Sect. 11 of the Act of 1876 cannot have the construction placed upon it by the appellants. The words "or otherwise" can only refer to a general statutory authority applicable to all unions. If the Legislature had intended to repeal the local Act it would have done so in express terms, as has been done in other cases. The repeal of a local Act cannot be effected merely by implication: *London Corporation* v. *Netherlands Steamboat Co.* (2), in which *Sion College* v. *London Corporation* (3) is discussed. The construction adopted by the Court of Appeal of s. 64 of the Poor Law Amendment Act, 1844, is perfectly correct, and the consent of two-thirds of the guardians was required. Otherwise the repeal

(1) (1837) 6 A. & E. 34. (2) [1906] A. C. 263.
(3) [1901] 1 K. B. 617.

would be involved of s. 32 of the Poor Law Amendment Act, 1834, which requires a like consent in the case of any dissolution of a union or alteration of parishes. The natural construction of s. 64 is that such consent is still required, and the view of the appellants would make it necessary to change the words "in any parish" in the proviso into "any such parish."

Macmorran, K.C., in reply.

The House took time for consideration.

Nov. 26. LORD LOREBURN L.C. My Lords, having had the advantage of reading in print the opinion of Lord Macnaghten, and as I agree with him, it is not necessary for me to enter at length upon the points raised in this appeal. However, I have the misfortune to differ from the Court of Appeal, and it is right I should briefly explain my reasons.

The respondents put forward two contentions before your Lordships. In the first place they say that the parish of St. Mary's has not been validly united with certain other parishes under the order of the Local Government Board, because the consent of the guardians of the union has not been obtained, and that such consent is required by the proviso in s. 64 of the Act of 1844.

I agree that this section is clumsily put together, but I do not think it should be construed as the respondents propose. The section at its commencement discriminates between guardians of a union and guardians of a parish. The proviso on which reliance is placed does not, as it seems to me, touch guardians of a union, but only guardians of a parish where there are such guardians. That is to say, it only relates to one of the two classes separately mentioned at the commencement of the section. The allusion to overseers of the poor confirms this view. If so, the consent of the guardians of the union was not required, and the first contention of the respondents fails.

The second contention of the respondents was that the Local Government Board had no power to make an order dissolving the union. But they are confronted with s. 11 of the Act of 1876, which authorizes the Board to dissolve "any union

H. L. (E.) 1908

LOCAL GOVERNMENT BOARD v. SOUTH STONEHAM UNION.

Lord Loreburn L.C.

whether formed under the Poor Law Amendment Act, 1834, or otherwise." This union was formed under a local Act. Surely it was formed otherwise than under the Poor Law Amendment Act, 1834. I do not see why a Court of law should put upon the words of s. 11 a limitation which is not dictated by grammar or context, nor indeed required, even if that would suffice, by any obvious convenience.

In my opinion the power which the respondents deny is explicitly given to the Board by the 11th section. It is true, as Buckley L.J. points out, that the language is general, but I think one object of the Act was to simplify administration, and for that purpose to dissolve unions where necessary. And in face of the definition found in the Act of 1834, the rule laid down by Lord Selborne, in accordance with settled authority to which the Lord Justice alludes, does not seem to apply. On this point I agree with the majority of the Court of Appeal.

LORD MACNAGHTEN. My Lords, I do not think there is much difficulty about this case or about the construction of the various sections of the Poor Law Acts which came under discussion in the course of the argument.

The Local Government Board, now representing the Poor Law Commissioners for England and Wales, has made an order by which it purports to do three things: (1.) To dissolve a union constituted under a local Act passed in 1773; (2.) to separate two parishes from an adjoining union—the union of South Stoneham; (3.) to unite those two parishes with the several parishes which were united long ago under the Act of 1773. The object of the Local Government Board is to make the new union coterminous with the present county borough of Southampton.

No one can say that that is not a very desirable object. No one can contend that the object is impracticable. However, on behalf of the South Stoneham Union, from which the two parishes are to be detached, it is contended that the transaction has not been carried out in a strictly regular and orthodox manner. The South Stoneham guardians seem to be great sticklers for regularity. That, too, is a desirable object. But it

may be doubted whether in a certain event the ratepayers of South Stoneham will be disposed to regard with much favour a costly litigation which cannot altogether prevent, though it may hamper and delay, the action of the Local Government Board.

The South Stoneham guardians originally objected to each of the three steps, dissolution, separation, and reunion. The Court of Appeal by a majority decided against them as regards their objection to the first step. Their objection to the second was withdrawn. As regards the third the Court of Appeal unanimously decided in their favour.

The result of the decision was a serious matter for the Local Government Board. The Board was compelled to appeal. The South Stoneham guardians, as respondents, then raised again the contention on which they failed in the Court of Appeal. It will be convenient to take that point first. It depends simply on s. 11 of the Poor Law Amendment Act of 1876. Sect. 11 authorizes the Local Government Board, if the Board thinks it expedient, to dissolve any union, "whether formed under the Poor Law Amendment Act, 1834, or otherwise." It was contended that this provision does not apply to unions formed under local Acts. With that contention I cannot agree. The words are perfectly general and must apply, I think, to every union however formed. There can be no hardship on anybody. The order for dissolution can only be made after a public inquiry, at which all persons interested may be heard.

The point on which the Court was unanimous in favour of the guardians is perhaps rather more difficult. But, speaking for myself and speaking with the utmost respect for the Court of Appeal, I cannot help thinking that to some extent the difficulty has been created by the Court itself. The point is involved in the construction of s. 64 of the Act of 1844. For some reason, which I do not quite understand, every member of the Court has assumed that a proviso in that section on which the question mainly turns has got into the section by some blunder. "In the middle of s. 64," says the Master of the Rolls, "is found a proviso which seems to have no relation to the earlier part of the section. It must, I think, be regarded as a separate and independent enactment." Both Fletcher Moulton and Buckley L.JJ.

H. L. (E.) 1908

LOCAL GOVERNMENT BOARD v. SOUTH STONEHAM UNION.

Lord Macnaghten.

say that the proviso is "obviously misplaced." "It is," says Buckley L.J., "no qualification of anything which precedes." Both these learned Lords Justices hazard various conjectures as to the place where this unfortunate proviso might have been inserted. And then the Court attempts to construe it without regard to its surroundings, as if it had dropped from the clouds.

Now I am unable to agree with that view. I think the proviso is a qualification of the preceding enactment, which is expressed in terms too general to be quite accurate. I think the proviso is in its proper place, though it must be admitted that the meaning of the Legislature is somewhat obscured and the connection between the opening words of the section and the proviso rather awkwardly broken by a digression as to the mode of appointing chairmen and vice-chairmen. If you leave out that digression the meaning of the section is, I think, perfectly clear. It draws a distinction at the outset between a parish and a union of parishes. What it says is this: The guardians of every parish or union acting under any local Act shall act as a board—at a meeting—and not individually. Afterwards there comes a proviso or qualification or exception, whatever you may call it. The proviso takes notice that in one case the guardians of a parish under a local Act must act individually. It is the case where the Poor Law Commissioners propose to unite a parish containing more than 20,000 persons with some other parish. That they are forbidden to do without the consent in writing of at least two-thirds of the guardians of the parish which contains so large a population.

If you will turn to s. 28 of the Act of 1834 you will see that that section is framed on precisely the same lines. It provides that no guardian, being a member of a board of guardians of a union constituted by the Act of 1834, shall have power to act in virtue of his office otherwise than as a member and at a meeting of the board, except where directed so to do by the Commissioners, and also except for the purpose of consenting to the dissolution or alteration of any union or any addition thereto, or to the formation of any union for the purposes of settlement or rating. All those consents require the concurrence of the whole or of a prescribed number of the guardians. Where the consent of all

or the consent of a prescribed number is required the guardians must act individually, and the proviso, therefore, in s. 64, was inserted, not I think improperly, as an exception to the preceding enactment.

If the proviso is a qualification of the earlier part of the section and is to be read in connection with it, there can be no reason why the word "parish" in the proviso should mean anything but what the expression means in the opening words of the section, that is to say, a single parish having guardians of its own. The proviso does not, I think, touch the case of a union.

I am therefore of opinion that the appellants are right and that the appeal must be allowed with costs.

LORD ROBERTSON. My Lords, I confess I think this is a narrow question, but upon the whole I have come to the conclusion that the appellants are right.

LORD LOREBURN L.C. I understand that both my noble and learned friends Lord Atkinson and Lord Collins agree in the conclusion at which your Lordships have arrived.

Order of the Court of Appeal reversed. Order of the King's Bench Division restored, with costs here and below.

Lords' Journals, November 26, 1908.

Solicitors: *Sharpe, Pritchard & Co.; Lees, Butterworth & McDonnell, for E. T. Westlake, Southampton.*

[HOUSE OF LORDS.]

H. L. (I.) 1908 Dec. 1.

ROWE . . . . . APPELLANT;

AND

GOUGH AND OTHERS . . . . . RESPONDENTS.

GOUGH AND OTHERS . . . . . APPELLANTS;

AND

BOLTON AND ANOTHER . . . . . RESPONDENTS.

Landed Estates Court, Ireland—Land Judge's Conveyance—Lands sold subject to Jointure but indemnified against Jointure by unsold Lands—Jointure prior to Incumbrances—Rights of Jointress—Incumbered Estates Court (Ireland) Act, 1858 (21 & 22 *Vict. c.* 72), *ss.* 61, 85.

Lands sold under the Incumbered Estates Court (Ireland) Act, 1858, were sold subject to a jointure annuity but indemnified against the jointure by unsold lands, and were so conveyed to the purchasers. Before the sale and conveyance the jointure ranked after incumbrances upon the lands:—

Held, that after the sale and conveyance the effect of s. 61 of the Act of 1858 was to give the jointress the first charge upon the sold lands, and to give those lands a preferential charge in respect of the indemnity upon the indemnifying lands.

Decisions of the Court of Appeal in Ireland, [1907] 1 I. R. 380 and [1908] 1 I. R. 402, reversed, and decisions of Ross J., [1907] 1 I. R. 380, restored.

IN 1879 and 1880, on the petition of the owner, lands in Wexford (part of the Rowe estate), which were subject to a contingent jointure annuity of 300*l.* ranking after the bulk of the incumbrances affecting the lands, were ordered to be sold in the Incumbered Estates Court. By the conditions of sale each of the lots 1 to 46 was to be sold subject to the jointure annuity but indemnified by lots 47 to 51. The 13th condition was as follows: "The several lots of this estate are subject to a contingent jointure annuity of 300*l.* to be payable to" Mrs. Rowe, "the wife of the owner in this matter, during her life in the event of her surviving him, created by an indenture dated the 16th day of August, 1876, and made between Ebenezer Rowe, 1st part, Annette Letitia Elizabeth Ridgeway, 2nd part," and

others of the 3rd and 4th parts. "Each of the lots 1 to 46 inclusive in the rental will be sold subject to the entire annuity of 300*l.*, but indemnified against payment of any part of the same by lots 47 to 51, which will be sold by the Court, primarily liable to bear the same in the proportion following, viz.:—Lot 47 will be primarily liable to bear 41*l.* 7*s.* 5*d.* Lot 48, 43*l.* 11*s.* 9*d.* Lot 49, 32*l.* 4*s.* 3*d.* Lot 50, 69*l.* 14*s.* 2*d.* Lot 51, 113*l.* 2*s.* 5*d.*, and each of said last-mentioned lots will be sold subject in conjunction with all the other lots in the rental to the entire of the said annuity, but indemnified by the others of said last-mentioned lots in respect of the sum above set opposite each of such lots respectively, and liable to bear the sum set opposite to such lot itself in indemnification of all other lands liable thereto." Twenty-nine of the lots 1 to 46 were sold, and the purchasers received conveyances in accordance with condition 13. In 1906 the unsold lands were in process of sale to the occupying tenants under the Land Purchase Acts.

Upon an application to the Land Judge by the purchasers of the twenty-nine lots, the Land Judge, Ross J., held that the unpaid incumbrancers claiming to be in priority to the jointress Mrs. Rowe, "who were parties to the sale and could have objected to the conditions of sale, could not be permitted to set up their incumbrances in priority to and to the detriment of the purchasers, who obtained conveyances from the Court in accordance with the conditions of sale." (1)

In 1907, Mrs. Rowe, whose husband had died in 1896, but who had so far received nothing in respect of her jointure, brought an action against Gough and others, purchasers of the twenty-nine lots, to enforce her claim. Then the purchasers asked the Land Judge for an order that the rents of the indemnifying lots might be applied to the payment of Mrs. Rowe's jointure to avoid circuity of action. Ross J., adhering to his former decision, made an order accordingly on May 17, 1907. (2) The Court of Appeal in Ireland on June 27, 1907, reversed the two decisions of Ross J., holding that the jointress could not recover out of any part of the estate any money on foot of her jointure unless

(1) [1907] 1 I. R. 380, 384.

(2) [1907] 1 I. R. 380, 387.

H. L. (I.) 1908 ROWE v. GOUGH. GOUGH v. BOLTON.

and until the incumbrancers whose incumbrances were originally prior to the jointure had been paid. (1)

In January, 1908, the action *Rowe* v. *Gough and Others* came before Kenny J. (sitting for the Master of the Rolls). (2) Kenny J. thought that Mrs. Rowe would have been entitled as of course to the usual decree but for the order of the Court of Appeal which the defendants set up by amendment to their defence. But in deference to the Court of Appeal he made only a qualified decree in accordance with their order. Mrs. Rowe appealed, but her appeal was dismissed with costs. The order of Kenny J. was affirmed on May 18, 1908, by the Court of Appeal in Ireland (Sir S. Walker L.C., Fitzgibbon and Holmes L.JJ). (3) From the decisions of the Irish Court of Appeal the two present appeals were brought by Mrs. Rowe and Gough and others respectively and were heard together.

Nov. 30, Dec. 1. *Serjeant O'Connor, K.C.*, and *Ronan, K.C.* (*John Leech* with them, all of the Irish Bar), for the appellant Mrs. Rowe. The twenty-nine lots sold in 1880 were sold subject only to the jointure annuity and were conveyed to the purchasers under s. 61 of the Landed Estates Court (Ireland) Act, 1858, the effect of which was that the purchasers obtained the lots subject to the jointure, but indemnified as to the jointure by the unsold lots and discharged from "all former and other rights, titles, charges and incumbrances whatsoever."

This was plainly declared in the two decisions of Ross J., which made correct and appropriate orders, and the appellant asks to have them restored and the other orders reversed.

Matheson, K.C. (*D. F. Browne, K.C.*, *James O'Connor, K.C.*, and *J. E. Walsh* with him, all of the Irish Bar), for Gough and others, purchasers. The orders of the Court of Appeal deprive the purchasers of their right of indemnity. The incumbrancers must be taken to have assented to the form in which the conveyances were executed and cannot now be heard against it: see s. 85 of the Act of 1858. [He referred to *Rorke* v. *Errington* (4) and was stopped.]

(1) [1907] 1 I. R. 380, 388—392.
(2) [1908] 1 I. R. 402, 406—411.
(3) [1908] 1 I. R. 402, 412—422.
(4) (1859) 7 H. L. C. 617.

William Jellett, K.C., and *W. R. Crozier* (both of the Irish Bar), for Bolton and Scott, incumbrancers on the indemnifying lots. The priority of the incumbrancers on the unsold lands could not be and were not affected by the conditions of sale or the conveyances under which the sold lands were conveyed to the purchasers. What happened on that sale and those conveyances does not touch the rights of the incumbrancers upon the unsold lands. The incumbrances always had a priority over the jointure annuity, and nothing occurred to postpone them to the annuity. The only effect the indemnity had (if any) was to give an indemnity against the indemnifying lots when sold, but not till then.

ROWE *v.* GOUGH.

LORD LOREBURN L.C. My Lords, in the first appeal of *Rowe* v. *Gough* a confusion has led to the defeat of the plaintiff in an absolutely undefended case. Her claim is for arrears of a jointure, and it is not suggested that she is not entitled to recover six years' arrears. No one denies that her charge is good upon the lands sought to be made liable. But it is argued that inasmuch as those lands were to be indemnified by other lands also subjected to this charge, and there are incumbrances upon those other lands prior to the plaintiff's charge, some complication or conflict of interest arises to prevent her recovering, at any rate at present, what is due to her from the lands entitled to indemnity.

I cannot accept this view. I think the order of Kenny J. must be varied by making an order for the appointment of a receiver over the rents and profits of the indemnified lands for the purpose of discharging the jointure.

In regard to the argument that there is an estoppel by judgment, I see no judgment to the effect that the plaintiff's charge over the lands sought to be made liable in this action is postponed to any other charge. There is an expression of opinion to that effect put as a preface to the operative part of the order made by the Court of Appeal on June 27, 1907; but, with the utmost respect to the Court of Appeal, I cannot agree with the opinion there expressed, and the counsel for the respondents did not

H. L. (I.) 1908

ROWE v. GOUGH.

GOUGH v. BOLTON.

attempt to defend it. It does not seem to me that the Court on that occasion had any jurisdiction to decide that point.

I move your Lordships to give the judgment which I have indicated.

LORD ASHBOURNE. My Lords, I entirely concur with the judgment of the noble and learned Lord on the woolsack and in the orders he has indicated he will move.

This case, although it has taken a good deal of time for discussion, and has been presented to the attention of your Lordships with great insistence and clearness, really rests in the narrowest possible compass. There is practically no controversy upon the facts of the case, which are extremely few.

In a deed of conveyance in the Landed Estates Court, made some twenty-five or twenty-six years ago, there was contained a clear indemnity as to the payment of the jointure which has been so often discussed, and the real question in controversy here is, How is that indemnity to be worked out? It is the voice of the Court, it is the decision of the Court, the award of the law. It must be given the fullest possible construction; it cannot be lessened, and there is no suggestion that it should be enlarged; and yet I am afraid, unless the decision moved by my noble and learned friend on the woolsack is given effect to, the indemnity would be worth but little.

The jointure created of 300*l.* a year on certain lands in Wexford was contingent, the husband being alive at the time when the conveyance was made in 1881 or 1882, and upon the lands that were sold the jointure was charged equally with the other lands that were not sold; but for the convenience of the sale, and as a method of carrying out the entire arrangement, which must have presented itself to those having the carriage of the sale, and the judge who was to decide upon the matter, it was arranged that the jointure, although charged upon the sold lands, should be indemnified by the unsold lands.

In those times it was probably thought that this was a very solvent estate, and it was not thought that there would be the slightest difficulty in paying all the numerous incumbrances, and

paying the jointure as well whenever it became an actual charge; but time went on, and it turned out that the estate had become of much less value in the market; and at the present time we are told that the incumbrancers on the unsold portion of the property have little chance of getting all their charge, and are therefore careful in looking after all the matters involved.

Under those circumstances, in the events that have happened, the husband having died, the jointress, not having been paid for a considerable time and not knowing exactly what was the position of her rights, acting under the careful advice of those assisting her, made a claim against the sold lands for the payment of her jointure. There was no answer to that. But when the purchasers, who had bought with the benefit of the indemnity stated in their conveyances, were informed of the matter, they, of course, had to protect themselves, and then the matter developed in litigation. What was to happen? They naturally sought to make the indemnity which they had got operative and effective. They said, "You cannot go against our land; we are protected." Remedy was then sought against the unsold lands. The matter went before Ross J., and I may say shortly I agree entirely with his judgment and his orders in reference to the matter.

When the case went to the Court of Appeal in Ireland it was impressed by the fact that if the indemnity were applied in the way contended for it would reverse and invert the priorities as they existed independent of the indemnity. But one cannot escape from the indemnity. The indemnity is there, and, whatever its effect may be, it must be worked out so as to make it a real and effective indemnity. I venture to think myself that that is not done by the orders of the Court of Appeal, because it is clear that they felt that it was a hardship, and it is a hardship, in the events as they now are, to tell the incumbrancers, You must submit to a variance of the priorities such as did not at first exist, and you must do that in consequence of the indemnity which has been so much under discussion.

I agree with Ross J. and I hold that the indemnity must be given full effect to. There is no answer to the case that is made on the part of the jointress against the lands that have been

H. L. (I.) 1908

ROWE v. GOUGH. GOUGH v. BOLTON.

sold. There is no answer that I can see to the claim made by the purchasers of the sold lands, that they are entitled to be indemnified and recouped for all losses that they may sustain in reference to any claim or defence made against them on foot of the jointure. Therefore I concur in the orders indicated by the noble and learned Lord on the woolsack.

LORD MACNAGHTEN. My Lords, I quite agree. In the action *Rowe* v. *Gough* I think the plaintiff is clearly entitled to the order she asks for. Undoubtedly the learned counsel for the defendants were placed in a position of great difficulty by the order of the Court of Appeal. Against their better judgment they adopted the defence which the Court of Appeal forced upon them. I do not see how they could have helped adopting it. But the plaintiff ought not to suffer for that, and I think she is entitled to the costs of the action.

In the other case I think Ross J. was perfectly right in both the orders he made, and right too in saying that the Court is bound to keep faith with its purchasers. As I read the conditions of sale which the Court put forward on behalf of all concerned as the terms on which the public was invited to bid, and on the faith of which the indemnified lots were bought, nothing can be clearer than this :—that the indemnity in favour of the purchasers was to be worked out by a preferential charge on the indemnifying lots. If the 13th condition of sale means what the Court of Appeal thought it meant, it would be a most misleading condition. The reference to the sale of the indemnifying lots cannot be construed as an intimation that the indemnity was subject to the claims of prior incumbrancers as Mr. Jellett argued. It was inserted for the purpose of making it clear that the charge on those lots was in exoneration of the indemnified lots and also for the purpose of defining the proportions in which the purchasers of the indemnifying lots were to bear the burthen as between them also. The charge upon the indemnifying lots is perfectly plain. It fastened on those lots the moment the indemnified lots were sold. And now that the indemnifying lots have been bought by the occupying tenants the charge is transferred to the purchase-money, and the

purchase-money must be applied in satisfaction of the claim of the owners of the indemnified lots. But this is their right, not the equity of the jointress. She has nothing to do with this part of the arrangement, and ought not to have been dragged into this controversy.

Order of the Court of Appeal in Ireland of the 18*th May*, 1908, *reversed; Order* (*inter alia*) *for the appointment of a receiver over the rents and profits of the lands for the purpose of discharging the annuity; the respondents to pay the appellant so much of the arrears as have accrued during the six years before the action and her costs here and below.*

Lords' Journals, December 1, 1908.

GOUGH *v.* BOLTON.

Order of the Court of Appeal in Ireland of the 27*th June*, 1907, *reversed and Order of Ross J. of the* 17*th May*, 1907, *restored; Mrs. Rowe's costs of this appeal to be paid by the appellants Gough and others and by the respondents Bolton and another in equal shares; the costs of the appellants Gough and others here and below to be paid by the respondents Bolton and another.*

Lords' Journals, December 1, 1908.

Solicitors: *Littledale & Lefroy, for Clifford Lloyd, Dublin; Nicholson, Patterson & Freeland, for O'Flaherty & Son, Dublin; Lethbridge, Money & Prior, for Thomas Crozier & Son, Dublin.*

[HOUSE OF LORDS]

H. L. (E.) 1908 *Oct.* 27, 29; *Dec.* 3.

DEWAR . . . . . APPELLANT;

AND

GOODMAN . . . . . RESPONDENT.

Landlord and Tenant—Covenant running with the Land—Covenant by Underlessor with Underlessee to perform Covenants of Head Lease—Collateral Covenant.

There is no authority for the proposition that a covenant in a lease to do an act not in respect of the demised premises, but which will protect from forfeiture the estate of the lessee in those premises, is a covenant which runs with the land.

A lease for years of land contained a covenant by the lessee to keep in repair all buildings erected on the land and a proviso for re-entry for breach of that covenant. Of several houses erected on the land two were demised by an underlease in which the underlessor covenanted for himself and his assigns with the underlessee and his assigns (1.) for quiet enjoyment; (2.) for the performance of the covenants of the head lease by the lessee thereof so far as they affected the land included in the head lease and not demised in the underlease; (3.) to indemnify the underlessee and his assigns against breaches of those covenants. The underlessor's assignee (in whom the head lease had vested) failed to perform the covenant to repair in the head lease, and the head lessor re-entered on all the land demised by the head lease and ejected the assignee of the underlessee from the two houses demised by the underlease:—

Held, that the covenant in the underlease to perform the covenant in the head lease relating to premises not demised by the underlease, being a covenant not touching or concerning the land demised in the underlease, did not run with the land, and that the assignee of the underlessor was not liable for breaches of the above-named covenants in the underlease.

Decision of the Court of Appeal, [1908] 1 K. B. 94, affirmed.

A LEASE in 1820 of land in Chelsea for eighty-nine years contained a covenant by the lessee to keep in repair all buildings erected on the land and a proviso for re-entry on breach of that covenant.

In 1886 an underlease was granted by Barns (in whom the lease of 1820 had become vested) to Humphrey containing the covenants stated in the head-note and demising two out of 211 houses which had been erected on the land.

In 1903 the appellant Dewar became the assignee of Humphrey in respect of the underlease.

In 1905 a Chelsea company who had acquired the reversion expectant upon the determination of the lease of 1820 obtained judgment for possession of the land demised by that lease against the respondent Goodman, in whom that lease had become vested, and who had failed to keep in repair the houses erected on the land, including the two houses demised by the underlease.

The appellant was ejected under that judgment and brought this action against the respondent for breaches of the covenants by the underlessor contained in the underlease and stated in the head-note. The action was tried by Jelf J. without a jury, and judgment was entered for the respondent. (1) This decision was affirmed by the Court of Appeal (Lord Alverstone C.J., Buckley and Kennedy L.JJ.). Hence this appeal.

Oct. 27, 29. *W. Copping*, for the appellant. The covenant by the lessor in the underlease for the performance of the covenants in the lease of 1820, so far as they relate to land included in that lease but not included in the underlease, is an extension of the covenant for quiet enjoyment and touches and concerns the estate of the lessee. By 32 Hen. 8, c. 34, the benefit of the covenants on the part of the lessor in the underlease runs with the land and the burden runs with the reversion. The case comes within the resolution in *Spencer's Case*. (2) The question is not of the land itself, but of the estate in the land. "Running with the land" means accompanying the estate in the land. In the words of Wilmot C.J., one must "strip the mind of the idea of matter": *Bally* v. *Wells* (3), where the covenant was held to run with the tithes, an incorporeal hereditament. The appellant is entitled to the benefit of the covenant in the lease of 1820 whereby the respondent's predecessor in title undertook to keep all the buildings on the land in repair. It enlarges the covenant for quiet enjoyment. Ejectment from the land demised surely touches the thing demised: see *Lewis* v. *Campbell*. (4) Here

(1) [1907] 1 K. B. 612.

(2) (1582) 5 Rep. 16a; 1 Sm. L. C., 11th ed., p. 55.

(3) (1769) 3 Wils. 25.

(4) (1819-1820) 3 Moore, C. P. 35; in error 3 B. & Ald. 392.

H. L. (E.) 1908 DEWAR v. GOODMAN.

assigns are named, and this distinguishes the present case from *Doughty* v. *Bowman* (1) and this is the true ground of that decision.

The covenant affects the thing demised and relates to things to be done or not to be done on the land. Many covenants having a less immediate connection with the property have been held to bind or be enforceable by purchasers or transferees: *Vernon* v. *Smith* (2), a covenant to insure; *Sampson* v. *Easterby* (3), to erect buildings; *Hooper* v. *Clark* (4), to leave the land well stocked with game; and the licence to kill game was held to be an incorporeal hereditament. Other covenants in the nature of services rendered have been held to attach to a reversion or assignment: to grind corn, *Vyvyan* v. *Arthur* (5); the sale or removal of hay or manure, *Chapman* v. *Smith*. (6) There are many decisions to the same effect in connection with tied public-houses and hotels: *Clegg* v. *Hands* (7); *White* v. *Southend Hotel Co.* (8); *Manchester Brewery Co.* v. *Coombs*. (9)

Acts, omissions, or payments not immediately connected with the land or arising out of the estate held are purely personal and collateral: *Mayor of Congleton* v. *Pattison* (10); *Stevens* v. *Copp* (11); *Thomas* v. *Hayward* (12); *Gower* v. *Postmaster-General* (13); *Woodall* v. *Clifton*. (14)

Atherley-Jones, K.C., and *S. C. N. Goodman*, for the respondent. In order that a covenant may run with the land there must be privity of estate between the covenantor and the covenantee. There was privity of estate between the appellant and respondent in respect to the two houses, not as to the 209. The covenant, to use Bramwell B.'s words in *Thomas* v. *Hayward* (12), "does not touch or concern the thing demised." But to run with the land more is required. Lord Kenyon C.J., in *Webb* v. *Russell* (15),

(1) (1848) 11 Q. B. 444.
(2) (1821) 5 B. & Ald. 1.
(3) (1829) 9 B. & C. 505.
(4) (1867) L. R. 2 Q. B. 200.
(5) (1823) 1 B. & C. 410.
(6) [1907] 2 Ch. 97.
(7) (1890) 44 Ch. D. 503.
(8) [1897] 1 Ch. 767.
(9) [1901] 2 Ch. 608.
(10) (1808) 10 East, 130.
(11) (1868) L. R. 4 Ex. 20.
(12) (1869) L. R. 4 Ex. 311.
(13) (1887) 57 L. T. 527.
(14) [1905] 2 Ch. 257.
(15) (1789) 3 T. R. 393.

added to the condition of its concerning the land "there must be privity of estate between the covenanting parties": see Platt on Covenants, p. 461. The covenantee must have an interest affected by the covenant: per Farwell J. in *Rogers* v. *Hosegood*. (1) The appellant here had no interest in the 209 houses.

Copping, in reply.

The House took time for consideration.

Dec. 3. LORD LOREBURN L.C. My Lords, I do not propose to review the authorities, which have been long followed, in regard to covenants running with the land. The words which describe them as "touching or concerning the thing demised" are familiar, and no nearer approach to certainty is attainable, though in their application difficulty may at times arise. I cannot say that I think there is any difficulty in the present case.

Mr. Copping, in his able argument, really asked your Lordships to say that the rule is different from that hitherto observed. It is manifest that this covenant does not touch or concern the thing demised, namely, the land contained in the lease, for it concerns repairs on totally different land. But he, in effect, argues that it touches and concerns the estate created by the lease, for that estate may come to an end if the covenant is broken. Buckley L.J. seems to me to summarize accurately the contention to which the appellant is driven. To prevail he must contend that "a covenant to do an act not in respect of the demised premises but which will protect from forfeiture the estate of the lessee in the demised premises is a covenant which runs with the land." There is no authority for this. The Lord Justice disposes of the suggested precedents. If we were at this date entitled to make a precedent, I can see directions in which it might prove fatal. But the principle is well settled.

An ingenious argument was used to the effect that in some way the construction of the covenant for quiet enjoyment was extended by reason of the presence of the other covenant to which I have already alluded, and that thus there has been a breach of the covenant for quiet enjoyment. It is not contended

(1) [1900] 2 Ch. 388.

H. L. (E.) 1908 DEWAR v. GOODMAN. Lord Loreburn L.C.

that except in this enlarged sense the covenant for quiet enjoyment has been broken, and I am quite unable to accept the doctrine of expansion. There is no authority for that either. Each covenant speaks for itself.

This disposes of the appeal. It may be a hard case on the plaintiff, but, like Jelf J., "I do not feel at liberty to decide the case upon the ground of expediency or morality," even if I were quite sure in which direction I should be impelled by either.

LORD ROBERTSON. My Lords, I concur.

LORD COLLINS. My Lords, I am of opinion that the decision of the Court of Appeal is right and ought to be affirmed. Indeed the point is expressly covered by the illustration given by Lord Coke under the second resolution in Spencer's case. He there says: "As, if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise . . . . it shall not bind the assignee because it is merely collateral and in no manner touches or concerns the thing that was demised or that is assigned over, and therefore in such a case the assignee of the thing demised cannot be charged with it, no more than any other stranger." Substitute repair for build and the instance is identical with the case before us. Therefore the main covenant relied on by the appellant is in itself collateral, and can only be contended in any sense to touch the land demised by importing the possibility that its non-performance might bring about a forfeiture at the instance of the head landlord, which has in fact occurred, and in respect of which the plaintiff is seeking to recover damages under the covenant of indemnity in this action. But it was held in *Doughty* v. *Bowman* (1) that a covenant by a sub-lessee to indemnify against breaches of covenant in the head lease is merely personal and does not bind his assignee. How, then, can the presence in the sub-lease of another collateral covenant, equally ineffective to bind assignees, convert the first covenant into one running with the land?

The reasoning in *Doughty* v. *Bowman* (1) is strongly against such a suggestion, and no authority has been adduced in support of it.

(1) 11 Q. B. 444.

The covenant for quiet enjoyment, restricted as it is, has not been broken, as Jelf J. points out, and the appellant therefore fails in shewing any liability in the respondent to make good the damage he has sustained. I think counsel for defendant perhaps relied too much on the contention that privity of estate was not established between the plaintiff and the defendant in the action in respect of the land on which the covenant of the sub-lessee was to be performed. No doubt privity of estate must exist between the assignee of the reversion and the assignee of the land demised, but privity of estate between the same parties is not vital in respect of the land on which the covenant is to be performed. The reason why the covenant to do something on land other than that demised presumably does not run is not because there is no privity of estate in the land on which the covenant is to be performed, but because such a covenant is prima facie collateral, i.e., does not touch or concern the land demised. But instances may be imagined of covenants to do things on land other than that demised which touch and concern so nearly the land demised as to run with it. Of this *Sampson* v. *Easterby* (1) is an instance, if it be assumed, as it seems to have been, that no demise was to be implied of the site on the waste where the mill was to be built. *Vyvyan* v. *Arthur* (2) is another instance where there was no privity of estate in the land on which the covenant was to be performed, but on special grounds the covenant was held to run.

I agree with the Court of Appeal that *Sampson* v. *Easterby* (1) is no authority for the running of the covenant in this case. It does decide that a covenant may run although there is no privity of estate in the land on which the covenant is to be performed, but it in no way supports the contention that the covenants in this case were other than collateral.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 3, 1908.

Solicitors : *Harold Edwards & Cohn ; Nash, Field & Co.*

(1) 9 B. & C. 505; 6 Bing. 644. (2) 1 B. & C. 415.

[HOUSE OF LORDS.]

H. L. (E.) 1908

June 22, 23; *Dec.* 7.

GREAT CENTRAL RAILWAY COMPANY . APPELLANTS;

AND

BANBURY UNION . . . . . RESPONDENTS.

SHEFFIELD UNION . . . . . APPELLANTS;

AND

GREAT CENTRAL RAILWAY COMPANY . RESPONDENTS.

Poor Rate—Railway—Link Line—Actual Net Earnings within Parish—Interest on Cost of Construction—Profits made outside Parish—Rateable Value, Test of—Rent "reasonably" to be expected—Parochial Assessment Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

In assessing the rateable value of a section of a railway link line within a parish the cost of construction of the link line, which connects two great systems, is not as a matter of fact and business experience a measure of the rent at which that section of the line may reasonably be expected to let within the meaning of the Parochial Assessment Act, 1836, and evidence of the interest on the cost of construction is not admissible.

The Act in speaking of a rent at which a hereditament may "reasonably" be expected to let excludes the idea of an oppressive demand fixed upon imagined necessities.

Decision of the Court of Appeal in the *Banbury Case*, [1907] 1 K. B. 717, reversed, and decision of the King's Bench Division, [1906] 1 K. B. 597, restored.

Decision of the Court of Appeal in the *Sheffield Case*, [1908] 1 K. B. 750, reversed as a corollary of the Banbury decision, and decision of the King's Bench Division, restored.

THESE two appeals were heard together.

In the Banbury case the following facts were stated by the quarter sessions for Oxfordshire.

The appeal was against a poor rate for the parish of Wardington, in which part of the appellants' line lay. The total length of the line is eight miles eighteen chains, of which one mile forty-seven chains are in the parish of Wardington. The line is connected at the northern end with the appellants' line at Woodford and at the southern end with the line of the Great Western Railway Company at Banbury, thus forming a main line route from the north to the south and west of England.

The line was constructed by the appellants in accordance with an arrangement made with the Great Western Railway Company for the more convenient interchange of traffic. The cost of constructing the line was approximately 280,000*l.*, which the Great Western Railway Company advanced to the appellants at 3½ per cent.

There are no stations or sidings on the line, nor does the line itself originate any traffic. The whole traffic consists of through traffic passing from the appellants' system to that of the Great Western Railway Company and vice versa.

It was admitted that no persons or companies other than the appellants and the Great Western Railway Company could be found to acquire the line, and that without the agreement for the interchange of traffic the line would be of no value and could not be let to either the appellants or the Great Western Railway Company.

8. For the appellants it was contended that, inasmuch as the line is an integral portion of the undertaking of the appellants, its rateable value in the parish of Wardington must depend on the actual net earnings of the line within the parish, such earnings being obtained owing to the agreement for interchange of traffic, and that to ascertain such net earnings there must be allocated to the line in the parish a mileage proportion of all rates and fares received by the appellants and the Great Western Railway Company for the whole journey in respect of all traffic passing over the line, and from the receipts so ascertained there must be deducted the usual and proper allowances for working expenses, Government duty, rental of stations separately assessed, trade profits, interest on tenant's capital, and the statutory deductions for maintenance and renewal.

Assessed on this principle the agreed rateable value of the line is 64*l.* per mile, and the rateable value of the line within the parish of Wardington is 102*l.*

For the respondents it was contended that the assessment committee in ascertaining the rateable value of this property were entitled to take into account the 3½ per cent. interest paid by the appellants to the Great Western Railway Company on the sum of 280,000*l.*, and that the interest might properly be

H. L. (E.) 1908 GREAT CENTRAL RAILWAY v. BANBURY UNION. SHEFFIELD UNION v. GREAT CENTRAL RAILWAY.

regarded as evidence of the rent which either the appellants or the Great Western Railway Company were prepared to pay for the line, and that as such it was uncontradicted, and that the interest being at the rate of far more than 1000*l.* per mile was evidence that the appellants would be willing to give a rent for the line in the parish sufficient to support the rate appealed against, and that the geographical position of the line indicated that it had a value apart from the actual net earnings on the line; and, in the alternative, that the line might reasonably be expected to let to the appellants or to the Great Western Railway Company at a percentage of the gross receipts earned on the line which would justify the assessment appealed against.

The quarter sessions overruled the contention of the appellants that the mileage proportion of receipts should be the sole basis of valuation. They held that interest on the cost of construction of the line was a matter which they were entitled to take into account as an element of calculation in ascertaining the rateable value, and they assessed the property at 1390*l.* gross and 795*l.* rateable value.

The question for the Court was whether the appellants were right in their contention that the rateable value of the line within the parish should be ascertained in accordance with the principle stated in paragraph 8, or whether in the particular circumstances the interest on the cost of construction of the line was an element which might properly be taken into account. It was agreed that if the Court were of opinion that the appellants were right in their contention the appeal should be allowed and the assessment of the line within the parish reduced to 593*l.* gross estimated rental and 102*l.* rateable value.

The King's Bench Division (Lawrance and Ridley JJ.) set aside the order of quarter sessions with costs and reduced the assessment to 593*l.* gross and 102*l.* rateable value. (1) This decision was reversed by the Court of Appeal (Vaughan Williams, Farwell, and Buckley L.JJ.), who restored the order of quarter sessions. (2) Hence this appeal.

June 22, 23. *Balfour Browne, K.C.*, and *C. A. Russell, K.C.* (*Mordaunt Snagge* with them), for the appellants. The rating

(1) [1906] 1 K. B. 597. (2) [1907] 1 K. B. 717.

authorities are not entitled to consider the profits of the line outside the parish of Wardington. The test is at what rent could that portion of the line now in question be reasonably expected to let. That is a question of fact, not law. The cost of construction is not a measure or test of the value, and the interest on the money borrowed, depending as it does on the credit of the borrower rather than on the value of the concern, furnishes no criterion of assessment. Profits earned outside the parish are not to be taken into account. The elements to be considered are gross receipts and mileage for the area assessed. If the remunerative portion of a railway is to be considered as enhancing the rateable value of the unremunerative, the whole parochial system disappears.

Ryde and *Cecil Walsh*, for the respondents. Neither in the Poor Relief Act, 1601 (43 Eliz. c. 2), nor in the Act of 1836 or any other statute is the amount of profits earned in any hereditament made a measure of the rateable value. The Banbury link was not constructed solely with a view to the net profits which might be earned upon it. It has a value apart from those profits, and the rent at which it might reasonably be expected to let cannot be measured by those profits. The one and only test of rateable value is the rent which may reasonably be expected. The cost of construction is not a measure of the rent, nor is any other one item a measure, but it is an element in arriving at the rent which ought not to be ignored. Some men might disregard it, but others who were possible tenants would certainly take it into account, and among them are the railway company, who must have carefully considered the cost of construction before making the link. In reason there ought to be no exclusion of considerations other than the parochial. There may be a loss on the link line taken by itself, but its contributive value to other parts of the system must be taken into account. There is no hard and fast rule confining the inquiry into parochial earnings: see per Lord Halsbury in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee*. (1) *Great Eastern Ry. Co.* v. *Haughley* (2) and *Reg.* v. *Llantrissant* (3) should be overruled

(1) [1901] A. C. 175. (2) (1866) L. R. 1 Q. B. 666.
(3) (1869) L. R. 4 Q. B. 354.

H. L. (E.) 1908

GREAT CENTRAL RAILWAY v. BANBURY UNION.

SHEFFIELD UNION v. GREAT CENTRAL RAILWAY.

on the point that parochial earnings are the only basis, and *South Eastern Ry. Co.* v. *Dorking* (1) should be followed. [The authorities which were referred to in the Court of Appeal and in the judgment of Lord Dunedin were discussed.]

C. A. Russell, K.C., in reply.

The House took time for consideration.

In the Sheffield appeal the facts were agreed to by the parties in a case set out in the report below. (2) The case invited the opinion of the Court on several points as to which this House declined to give any opinion. The point relevant to the present report arose thus. The Great Central Railway Company contended that in the Banbury case the rateable value of the Banbury link was estimated in excess of what it would be if regard was had only to the actual net earnings of the company on the Banbury link; that such excess was due to the Banbury link giving access to and providing profitable traffic for other parts of the company's system, including the lines in the parish of Sheffield; that the rateable value of the Banbury link so estimated arose in part from the profits of the Sheffield lines; and that in assessing the lines in the parish of Sheffield some deduction ought to be made in respect of the excess which the company were liable to pay for the occupation of the Banbury link. The Sheffield Union contended that the assessment of the lines in Sheffield parish was correct and that no such deduction as that claimed by the railway company ought to be allowed. The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.), varying an order of the King's Bench Division, held that after their decision in the Banbury case some deduction ought to be made in the Sheffield assessment in respect of any such excess which the railway company had to pay in the Banbury assessment, and that the rate ought to be amended accordingly. (2) Hence this appeal by the Sheffield Union.

June 23, 25. *Hugo Young, K.C.*, and *R. Cunningham Glen*, for the appellants.

(1) (1854) 3 E. & B. 491. (2) [1908] 1 K. B. 750.

C. A. Russell, K.C., and *Simon, K.C.* (*Konstam* with them), for the respondents.

The House took time for consideration.

GREAT CENTRAL RAILWAY *v.* BANBURY UNION.

Dec. 7. LORD LOREBURN L.C. My Lords, this is an appeal against the decision of the Court of Appeal confirming an assessment of the quarter sessions of Oxfordshire, whereby certain lines of the Great Central Railway in the parish of Wardington in the Banbury Union were assessed at the rateable value of 795*l.*, subject to a special case. The Divisional Court took a different view and assessed the said property at a rateable value of 102*l.*

The material facts are simple enough. In 1900 the Great Central Railway Company opened for traffic a line between eight and nine miles long, of which the property in question forms a part, between their own system at Woodford and the Great Western system at Banbury. I will call it the Banbury branch line, though, whatever it may be called, it is a part of the main line. It was built by arrangement with the Great Western Railway Company in order to connect the two systems and thus create a main line route from the north to the south and west of England. This Banbury branch line cost in construction about 280,000*l.*, which sum was advanced by the Great Western to the Great Central Railway Company at the rate of 3½ per cent. interest per annum. The capital raised by the Great Central Railway Company for the construction of the Banbury branch line is required by the Act of Parliament to be a separate capital, and "no mortgage debenture stock or liability of the company in respect of the general undertaking shall be a charge upon or in any way affect such separate undertaking or the receipts and revenue arising from traffic passing over the same." This is a provision for the better security of those who invest in the stock. For the rest, this "separate undertaking" (separated for the purpose described) is required to be worked and managed, and in fact is worked and managed, by the directors of the Great Central Railway Company. It is to all effects and purposes an important part of the railway system of that company.

H. L. (E.)
1908
GREAT CENTRAL RAILWAY v. BANBURY UNION.
SHEFFIELD UNION v. GREAT CENTRAL RAILWAY.
Lord Loreburn L.C.

The question presented to your Lordships is whether the part of this line lying in the parish of Wardington ought to be assessed only on its actual net earnings within the parish, ascertained in the usual way, or whether quarter sessions were entitled to take into account, as an element of calculation in ascertaining the rateable value, the fact that the Great Central Railway pays 3½ per cent. interest on its cost of construction, namely, 280,000*l*. In the former view the rateable value is 102*l*., in the latter view 795*l*.

I desire to point out that these are the only alternatives presented by quarter sessions. I do not by that mean to suggest that there was any other possible alternative. I mean that quarter sessions are the judges of fact in such matters, and they have in fact thought that the former is to be adopted if as a matter of law the latter is inadmissible. Your Lordships, therefore, have to consider whether or not quarter sessions were entitled to take into account the payment of interest to which I have referred. I think that is a matter of law relating to the relevancy of evidence.

My Lords, I naturally look for guidance to the authorities, but some of them, or at all events some of the opinions which they contain, are irreconcilable one with the other. I think the best course is to apply the principles on which those decisions are founded which, as I am obliged to make a choice, seem to me preferable as authorities.

The chief source of difficulty was foreseen long ago. It is this. A railway is an undertaking extended through a multitude of rating areas. Generally no section of it situated in any rating area would be rented by any tenant except as a component part of the system. Yet the governing statute requires the rateable value of every such section to be "the rent at which the same might reasonably be expected to let from year to year" after making the prescribed deductions. Obviously a natural way of ascertaining the rateable value of such a section in obedience to the statute is to consider at what rent it would be hired by the railway company to which the entire system belongs; usually no other tenant is conceivable. In such a state of things the railway company might be willing to pay almost any rent for

a section of the main line without possession of which its whole business might be dislocated and half ruined. But the statute speaks of a rent which might "reasonably" be expected, and this excludes the idea of an oppressive demand fixed upon imagined necessities.

It follows that the rent must be fixed in accordance with the real value of the section to the company concerned, because that is the footing on which a tenant would base his offer of rent if he be not exposed to extortion. And the method usually adopted for arriving at that real value is to ascertain the net earnings of the section by allocating to it a mileage proportion of all rates and fares received for the whole journey in respect of all traffic passing over the section, after making from the receipts proper allowances for working expenses, Government duty, rental of stations separately assessed, trade profits, interest on tenants' capital, and the statutory deductions. That is for present purposes a sufficient description of the usual method. I do not pretend to define it. No doubt this method is not ordered by the statute. It is, to use Lord Watson's phrase, a "formula." Nevertheless, though Courts of law have never said that it must be adopted, it is in ordinary cases a sound way of fixing the true value. When adopted by quarter sessions, the proper judges of this question of fact, Courts of law have repeatedly allowed it.

It does not treat all the miles on the line as of equal value. On the contrary. The measure of the value is the sum which is in fact earned by each mile, so that a much used mile will pay more, exactly according to its profit-earning use. Without saying that this formula is imperative, or usurping a right to decide on questions of fact, I do think it has been so long and so constantly applied that the tribunal which decides the fact would not depart from it without good reasons.

On the hearing of this appeal before your Lordships it was not disputed that the formula to which I have referred is applicable to ordinary cases. But, it was said, the present case is out of the ordinary, because this particular line, including the portion of it within Wardington parish, has a value apart from the actual net profits earned on it, and either the Great

H. L. (E.) 1908

GREAT CENTRAL RAILWAY v. BANBURY UNION.

SHEFFIELD UNION v. GREAT CENTRAL RAILWAY.

Lord Loreburn L.C.

Central Railway Company or the Great Western Railway Company might reasonably be expected to give a greater rent for it as a means of connecting their systems, which otherwise could not be effected. And so, it was argued, interest on the cost of construction is an element which might properly be taken into account in ascertaining the rateable value, for it shews what the railway company would give as rent.

Now I cannot assent to these contentions.

If there be a special value in the Banbury branch line, it must arise because this line is indispensable for through traffic from the north of England to the south and west, and therefore a railway company or companies occupying the other portions of the through line would give a great rent in order to occupy this also. No doubt that is true. It is also true of all other sections of the through line from the beginning to the end of it. No single mile could be spared. The statute says the rateable value is what a tenant might "reasonably" be expected to give as rent. That is not to be arrived at by assuming that the hypothetical tenant already controls all the rest of the line he requires and is driven by his necessities to pay excessively for the single link that he does not control. It would be equally reasonable for the railway company to say, "Here is a mile of railway line; you are to isolate it from the rest of the system, for all you are to rate is this single mile; no one would give a sixpence for an isolated mile of railway; therefore the rateable value is nil." When the method I have described is applied the true view seems to lie between these extremes. Each section is regarded as a profit-earning part of the system to which it belongs; each section is indispensable to the working of the system; and I think the resulting inquiry is, if the whole system were to be let at once, though it be in separate sections, how much of the rent that a tenant would give for the whole is applicable to the particular section which is to be assessed? That depends on profit earning.

Even if there were a special value in this Banbury branch line which could be considered in making the assessment, I do not see how it can be proper to measure that special value by the cost of construction or its annual equivalent, the interest

payable on that cost. It is not merely that the rate of interest will depend on the financial position of the borrowing company and the security it can offer. Possibly that criticism might be met by a correction so as to assume an ordinary commercial interest. The real objection is that cost is not a measure of rent. Many houses constructed at enormous expense notoriously fetch very moderate rents. Many portions of a railway cost immensely more than the average, where, for example, there are tunnels or bridges or embankments. If a railway company were considering what rent it could pay for an entire line offered for letting, the cost of construction would not be considered either of the whole or of its parts. The company would simply consider what rent it could pay so as to have a profitable concern.

It would be practicable, though I think it would be wrong, to rate every section of a line on the annual equivalent of its cost. But I do not think it is even practicable to adopt a mixed calculation based partly on profit earning and partly on cost. As Wightman J. said in *Reg.* v. *Middlesex Waterworks* (1), the Court is bound to protect the occupier from being rated beyond the rateable value of the whole apparatus taken together; and that could not be done under the mixed method adopted in this case.

Accordingly I think evidence of the interest on cost of construction was inadmissible.

I will only add that there may be exceptional cases, as, for example, where a railway company rents an auxiliary line, not really a part of its system, or a number of railway companies occupy in common a piece of line. I do not wish to say anything in regard to such cases unless and until they come to be argued before this House, feeling the danger of general rules beyond the need of the case under consideration.

I respectfully advise your Lordships that the appeal should be allowed, and the assessment fixed at 102*l*.

LORD MACNAGHTEN. My Lords, I agree.

(1) (1859) 1 E. & E. 716.

H. L. (E.) 1908

GREAT CENTRAL RAILWAY v. BANBURY UNION.

SHEFFIELD UNION v. GREAT CENTRAL RAILWAY.

LORD DUNEDIN. My Lords, the Lord Chancellor has narrated the facts out of which this appeal arises, which makes it unnecessary for me to recapitulate them. I confess that I have found the question one of great difficulty, and have risen from a repeated consideration of the numerous authorities quoted with a feeling akin to despair. It is not merely that the cases are conflicting. It is the province of your Lordships' House, as the final Court of Appeal, to determine such controversies by preferring one set of cases and rejecting others. The mischief lies deeper, and consists in the almost impossible task of directing an inquiry "by parochial authorities with limited powers on a subject which is parochial"—I am quoting the words of Coleridge J. in *Reg.* v. *London and Brighton Ry. Co.* (1) —where the true value of the subject, a piece of railway line, lies in the fact that it is a constituent part of a great undertaking which lies in many parishes, and that the profits of the undertaking, which as such are not rateable, but which go to shew the value of the various things which make up the undertaking, are not capable of being in any strict sense locally apportioned to each mile of the subject, which is after all only one of those various things. The true remedy is in the hands of the Legislature. This at least I think is clear, that no system of valuation will be satisfactory which does not treat a railway as a whole, and then proceed to apportion that whole for the purposes of rating among the parochial areas in which it has its local habitation. Such an attempt was made for Scotland in 1854, and though the Scottish system is open in detail to criticism and capable of improvement, it is at least right in principle, and a standing evidence that the problem is not insoluble.

We have here to take the English system as it is. The inquiry, as has been pointed out by Lord Halsbury in the case of *Mersey Docks, &c.* v. *Birkenhead* (2), is simple enough in statement. The overseers have to find out the rent at which the hereditament might generally be expected to let from year to year (under certain deductions which I need not mention). In the case of an ordinary subject, such as a house or a field, the method of inquiry is equally simple. But why? It is, I imagine,

(1) (1851) 15 Q. B. 313; 20 L. J. (M.C.) 124, 144. (2) [1901] A. C. 175, 180, 184.

because of two things—namely, first, that for such subjects there is always possible competition, and, secondly, that there are subjects similar in character which have borne the test of the market. The fact that there will always be found people who want houses and agricultural land, coupled with the fact that similar houses and lands have in the market of to-day been let at such and such a sum, is easily and rightly taken as proof of what the hypothetical tenant would reasonably be expected to pay. And this is the reason, I take it, that no one when dealing with inquiries into profits (as we shall presently see) has, however profitless the undertaking, contended that the valuation of a railway line or of the land used by any undertaking whatever should be nil. The value of the land as agricultural always remains. The same consideration is really the justification, if any exists, for the exemption of sewers, an exemption which Lord Herschell L.C. felt bound not to disturb, but which, viewing the sewer as a separate subject, he obviously doubted. The idea would seem to be that the sewer, as a disused sewer, was worth nothing to any one, and that the strip of ground a cælo usque ad centrum in which the sewer lay was already rated at its agricultural value.

If, then, the strip of land occupied by the railway in the parish had been left as a strip of land, no difficulty would be experienced. But it is turned into a railway line, and now emerges the difficulty, in the application to this altered subject of the simple question, what would the hypothetical tenant give as rent? Now, as the Lord Chancellor has already pointed out, if you looked at the question very narrowly the answer would be, Nothing—that is to say, nothing beyond the agricultural value. But that would be too narrow a way to look at it, because the underlying assumption would be that the hypothetical tenant was to be a person who was to occupy the subject in the parish and nothing else. But there is no reason why the hypothetical tenant should be so restricted. The true question is, therefore, what is the value of this bit of railway line to those who wish to possess bits of railway line, that is, to persons who have themselves railway lines elsewhere in connection with which they can utilize this bit?

H. L. (E.) 1908

GREAT CENTRAL RAILWAY v. BANBURY UNION.

SHEFFIELD UNION v. GREAT CENTRAL RAILWAY.

Lord Dunedin.

I venture to point out that the moment the question is put in that form you necessarily abandon, in its pristine purity, what has been called the parochial principle. That pristine purity is, in my judgment, only to be found in the very old cases where the value of a canal was taken as the tolls which were levied, and these tolls were held as accruing locally where they were de facto paid, and the same in the case of lock dues. And in truth the so-called principle was, if I may use such an expression, abandoned before it was stated. In the Amwell Spring case (1) no one supposes that the hereditament would have been worth 300*l.* a year if the tenant of the spring could do nothing with it except utilize it in Amwell.

Nevertheless it came to be stated, and in consequence there was invented another expression, intended to assist it, but which really cut its throat, namely, contributory value. The expression is convenient enough, but is calculated, I think, just as surely as the expression the parochial principle, to divert the mind from the true object of the inquiry. Let me attempt to see how this came to be done.

Early in the day the parochial authorities were confronted with the difficulty of rating a railway. The ordinary tests of similar property, subjected to the experience of the market, were absent. What were they to do? They began to inquire what the hypothetical tenant would give by endeavouring to see what the actual tenant made out of it. Now what he made out of it depended on his profits, and profits depend on the difference between gross takings and expenses. But there still remained the question of the allocation of those profits to the different local sections of the line. After some diversity of practice the point came up for decision in the Brighton Company's case. The competing theories there were between a value calculated on the basis of the net receipts in the parish on the one hand, and one calculated on a mileage division of the entire profits of the undertaking on the other, and the first method was preferred. The learned judges there based their judgment on the necessity of adhering to the parochial principle, and I think that any one reading that judgment might quite fairly

(1) See p. 93, n. (1).

summarize it in the words used in the head-note in the *Law Journal* (1): "The rateable value of the portion of railway occupied in any particular parish must be deduced from the net earnings in that parish ascertained by a comparison of the profits and outgoings arising in that parish, and not by treating the rateable value, however constituted, of the whole line of railway as entire, and dividing it among the several parishes simply according to the distance which the line passes through each." In that case, as the profits calculated, as the Court decided in the Croydon case, were greater than the profits averaged per mile, it was evident that there were other parts of the line which proved less profitable than the Croydon part; and accordingly Coleridge J. foresees and deals with the situation which will arise therefrom: "If you give Croydon the full benefit of all the earnings made by the railway in the parish, what is to be done in the case of a parish with some branch line in which the company may work at a loss? The answer is that that case must be decided when it arises between the company and that parish on the same principle as the present, without reference to Croydon."

But the parting of the ways was now to come, and it came in the case of *South Eastern Ry. Co.* v. *Dorking* (2), only two years after the Brighton Company's case. There the South Eastern Railway Company had first leased a branch line in perpetuity at a certain rent, and had then acquired the line by Act of Parliament, paying the stockholders of the old line by means of annuities which amounted to the same sum as the old rent. The assessment levied took this rent or sum of interest as the gross annual value of the line, and two questions in effect were put before the Court—(1.) whether the assessment could be confirmed simpliciter, and (2.), if not, whether the assessors were to take into account over and above the profits earned by the branch itself its value as a feeder to the main line. The Court was unanimous in holding that the assessment could not be confirmed simpliciter, thinking that the rent paid for a line in perpetuity, or the interest on the price of acquiring it in perpetuity, could never be said without more ado to be necessarily the value of the line as to a hypothetical tenant from year

(1) 20 L. J. (Q.B.) 124. (2) 3 E. & B. 491.

H. L. (E.) 1908 — GREAT CENTRAL RAILWAY v. BANBURY UNION. SHEFFIELD UNION v. GREAT CENTRAL RAILWAY. — Lord Dunedin.

to year. But on the second question they differed. Erle J., adhering to what he conceived had been established in the Brighton Company's case, answered the question in the negative; but Campbell C.J. and Crompton and Coleridge JJ. answered it in the affirmative, basing their judgment really on the views expressed in the Amwell case.

It is, I think, impossible to reconcile Coleridge J.'s views in this case with what he had done and said he would do in the Brighton Company's case. The whole point of the Dorking case is that matters outside the parish may affect the value of the property within it. But in the Brighton Company's case, as already pointed out, they had ignored the matters outside the parish—that is, that other portions of the line were maintained at a less remunerative local return, without which portions of the line, however, the full profits accounted for as value in Croydon could not have been earned. This, however, matters little. Each case was followed by a series of other cases. I do not think it is necessary to occupy your Lordships' time by detailing them. I shall content myself by saying that the legitimate successors of the Brighton Company's case were *Great Eastern Ry. Co.* v. *Haughley* (1) and *Reg.* v. *Llantrissant* (2), while those of the Dorking case were *London and North Western Ry. Co.* v. *Cannock* (3), *Reg.* v. *London and North Western Ry. Co.* (4), and *London and North Western Ry. Co.* v. *Irthlingborough*. (5)

The origin of the term contributory value which is to be found in these latter cases seems to me due to a well-meant but, I think, hopeless endeavour to reconcile all the decided cases. Campbell C.J., in deciding the second question of the Dorking case, says: "I wish implicitly to abide by what is called the parochial principle of rating." Of course this depends on what, in the learned Chief Justice's mind, was really "the parochial principle." But undoubtedly he was not adhering to the principle as put in practice in the Brighton Company's case.

(1) L. R. 1 Q. B. 666.
(2) L. R. 4 Q. B. 354.
(3) (1863) 9 L. T. 325.
(4) (1874) L. R. 9 Q. B. 134.
(5) (1876) 35 L. T. 327.

It is in this attempt to maintain the parochial principle and at the same time to prevent its strict application that I think the danger of the word "contributory" comes in. Contributory to what? To something outside the parish. In other words, this way of looking at it begins by assuming that the subject is parochially unproductive, i.e., without a value or parochially of small value, and then goes on to say it has a value or a greater value because it "contributes" to value elsewhere; whereas the real question is, Has it a value or has it not, and if it has, what is that value? That a thing may have a value, although that value is not realized locally, seems an undeniable proposition. And accordingly in the Amwell Spring case (1), which I take to be undoubted law, the Amwell lands were not spoken of as contributing to value elsewhere, but they were valued at Amwell as being of 300*l.* yearly value in respect of the advantages which the uncontrolled possession of the spring gave to the occupants thereof.

That being settled, the next inquiry must be, What is the evidence of value? Now that will vary according to the nature of the subject; but it is obvious that one piece of cogent evidence is the existence of actual competitors for the subject, who, it can be proved, would be willing to take it at a certain yearly sum. Now it is certainly significant that in nearly all these cases where a value greater than what I may call, for convenience, the local value to the actual occupier has been allowed this element of competition was present. In the Dorking case (where, be it remembered, no actual assessment was confirmed, but a theoretical question was answered by the Court) it was made matter of express admission that the Reading line, if in the market, might be competed for as between the South Eastern Company and other railway companies. In *Reg.* v. *London and North Western Ry. Co.* (2) it was stated that three other companies would be willing to acquire the line on the same terms as the London and North Western had it, which Blackburn J. explained to mean that each of the three companies would be willing to take it from year to year if they could get it. In *London and North Western*

(1) *R.* v. *New River Co.* (1813) 1 M. & S. 503. (2) L. R. 9 Q. B. 134.

H. L. (E.) 1908

GREAT CENTRAL RAILWAY v. BANBURY UNION.

SHEFFIELD UNION v. GREAT CENTRAL RAILWAY.

Lord Dunedin.

Ry. Co. v. *Irthlingborough* (1) the case set forth that the Great Eastern and Great Northern Railways were both in the same neighbourhood, and found as a fact that if the occupants were willing to let it they could do so at a rent equivalent to 45 per cent. of the gross takings. It seems to me that all of those judgments are supportable on these facts alone.

And here I must pause for a moment to say that I respectfully differ from the view as to competition expressed by Vaughan Williams L.J. in the Appeal Court in this case. I recognize the authority of the *London School Board Case* (2) and of the *Erith Sewer Works Case.* (3) They seem to me to fix conclusively that rateable value is not destroyed either because (1.) there is no profit de facto derived from the land, or (2.) the occupants were disabled from making profits, or (3.) there is no one in the world, except the actual occupant, who, if the land as occupied were given up, would have any possible use for it. But while they thus settle that the absence of all possible competition does not destroy the value of a subject, they do not seem to me for one moment to infringe the proposition that the existence of competition may enhance the value of a subject. It seems to me, therefore, that where there is the fact of possible competition and evidence of what the competitors might give, the assessors may well base on that the sum that would be given by the hypothetical tenant, and that such evidence was seemingly available in the three cases I have mentioned. The Cannock case, I admit, cannot be so explained. No actual assessment was confirmed, and what was the ultimate position of the case I do not know.

Where, however, there is no extrinsic evidence available, and the assessors have nothing to go by except the actual occupant's own experience, how is the inquiry to be conducted? We have been told what is called the ordinary way, which has been described by the Lord Chancellor. I confess that if there is no other evidence the matter seems to me here to end. I entirely agree with the remarks of the Lord Chancellor in this matter. The assessing authority cannot, I think, be heard to say, "All

(1) 35 L. T. 327. (2) (1886) 17 Q. B. D. 738

(3 [1893] A. C. 562.

your Great Western through traffic is dependent on this piece of line; therefore it has an enhanced value because you could not do without it." The same might be said as regards each and every isolated mile of line over which the through traffic goes. It is really what Lord Halsbury in one of the cases calls the blackmailing argument. You may spoil the ship for want of a pennyworth of tar. A prudent shipowner would pay a great deal not to spoil the ship. Yet to the hypothetical buyer the value of the tar still remains a penny. Nor do I think this consideration is altered by the fact that this portion of the line may have been made last. Indeed, though you may certainly take the existing occupant as one of the possible takers, and as thus, so to speak, competing with the hypothetical tenant, I am not satisfied that you are entitled to assume that the existing occupier is to be hampered by each and every one of his present conditions. I think this is what Mellor J. meant in the Llantrissant case when he said, "Some difficulties have been introduced by confusing the hypothetical tenant with the actual tenant; it is not because a particular tenant will give a large sum as rent that that is any criterion of the rateable value."

The conclusion, therefore, I come to is that if the formula described as "the ordinary way" is applied to the railway accounts, and there is no other extrinsic evidence, you cannot rightly alter the result by vague speculations as to whether the railway companies would not have acquired the piece of the line in question unless it had had a further contributory value. Indeed this method of reasoning would seem to lead to the curious result that the less valuable a branch seemed to be on a working out of traffic receipts, the more certain it was that it really had an enhanced value as the source of profits elsewhere.

Holding these general views and coming to the present appeal, I am prepared to concur in the proposal of the Lord Chancellor to allow the appeal on the ground that there are two alternative valuations submitted to us, in one of which no fault is apparent, while the other is confessedly based on the "taking into account" of what I think is an irrelevant consideration, namely, the fact that interest at 3½ per cent. on 280,000*l.* was

H. L. (E.) 1908

GREAT CENTRAL RAILWAY v. BANBURY UNION.

SHEFFIELD UNION v. GREAT CENTRAL RAILWAY.

Lord Dunedin.

paid by the occupying company, the 280,000*l.* being the cost of construction. Cost of construction is obviously an irrelevant consideration in getting at the rent to be paid by a hypothetical tenant. It was said to be so categorically by Blackburn J. in the London and North Western Railway case. And the fact of the payment of the 3½ per cent. interest seems to me to be no more than a statement of the terms on which the Great Central Railway Company were enabled to raise the money—as little relevant as would be a statement of whether they managed to place their original issue of capital at or below par.

I have come to this conclusion not without difficulty, because in doing so, and indeed in many of the remarks with which I have ventured to trouble your Lordships, I have felt that I have been painfully near to transgressing the views expressed in this House by my noble and learned friend Lord Halsbury, and concurred in by Lord Watson, as to the province of the Court and of the assessing body. But the fault, such as it is, was, I think, committed long ago; and I cannot think it is right to let the assessing body be guided by what I think a wrong view of what has been laid down in authoritative cases. Nor can I be indifferent to the ultimate justice of the proceeding. The other appeal which was heard along with this one is a commentary on that. If the judgment in this case is right, I cannot doubt the judgment in that case is the logical consequence. Yet a more hopeless inquiry I cannot imagine. How is it possible for the assessing body at Sheffield to find out the true amount of Sheffield profits which have been by the judgment of another tribunal (of whose proceedings and methods they know nothing, except the bare figure of assessment) determined as being truly due to the influence of the Banbury section? Yet if they do not, the railway company are obviously exposed to injustice.

I think the judgment proposed does not actually run counter to those views to which I have referred. The opinion by which they have been supported may do so. But I think even that is better than that it should be suggested to assessors that they are free to add to the apparent profits of the line some indeterminate sum to represent an enhanced value elsewhere, and that their

judgment is safe if they are only careful to conceal the method or want of method on which it is based.

EARL OF HALSBURY. My Lords, I only wish to say that having read the somewhat copious judgments which have been delivered I entirely concur in the conclusion at which your Lordships have arrived.

Order of the Court of Appeal reversed and Order of the King's Bench Division restored with costs here and below, and the rateable value fixed at 102*l.*

Lords' Journals, December 7, 1908.

Solicitors: *D. H. Davies; Hopwood & Sons, for E. Lamley Fisher, Banbury.*

SHEFFIELD UNION *v.* GREAT CENTRAL RAILWAY COMPANY.

LORD LOREBURN L.C. My Lords, the decision in this case is, as appears to me, a corollary of the decision just arrived at in the case of the Banbury Union. I have offered to your Lordships my reasons for thinking that the appeal should be allowed in that case, and I think the same in this. Unless the railway company is assessed in Banbury at a special value beyond the profit-earning capacities of the line there situated, there can be no ground for any allowance on that score being made in Sheffield.

I desire to add that the form in which this appeal has been raised is most inconvenient, and that I do not give either assent or dissent to the various hypothetical principles offered for our choice.

I decide this case because it is a corollary of the previous decision. If it had not been so I might have declined to answer.

EARL OF HALSBURY. My Lords, I entirely concur. I myself feel the difficulty which the Lord Chancellor has just pointed out as to the form in which this appeal has been presented. I must

H. L. (E.) 1908 GREAT CENTRAL RAILWAY v. BANBURY UNION. SHEFFIELD UNION v. GREAT CENTRAL RAILWAY.

say that I should decline to answer a series of conundrums propounded in this form.

LORD MACNAGHTEN. My Lords, I agree.

LORD DUNEDIN. My Lords, I also agree.

Order of the Court of Appeal reversed and Order of the King's Bench Divisi n restored with costs here and below.

Lords' Journals, December 7, 1908.

Solicitors: *Pilgrim & Phillips, for Watson, Esam & Barber, Sheffield; D. H. Davies.*

[HOUSE OF LORDS.]

[CONSOLIDATED APPEALS.]

H. L. (E.) 1908 *June* 25, 29; *Dec.* 8.

DYSON AND OTHERS . . . . . APPELLANTS;

AND

FORSTER AND OTHERS . . . . . RESPONDENTS.

DYSON AND OTHERS . . . . . APPELLANTS;

AND

SEED, QUINN, MORGAN AND OTHERS . . . RESPONDENTS.

Covenant—Compensation for Subsidence—Lease—Owners for Time being—Covenant running with the Land—Benefit of Covenant—Heirs and Assigns of Covenantee—Covenantee not a Party—Real Property Act, 1845 (8 & 9 *Vict.* c. 106), *s.* 5—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict.* c. 41), *s.* 58, *sub-s.* 1.

In a mining lease granted by the owners of the minerals (who were not owners of the surface) the lessee (which expression was to include his executors, administrators, and assigns, unless such construction was excluded by the sense or the context) covenanted with the lessors and "as separate covenants with other the owner or owners occupier or occupiers for the time being" of surface lands to pay to the lessors

and other the covenantees or covenantee compensation for all damage occasioned by the working of the coal demised. The lease was assigned to a colliery company and damage was occasioned to the surface by the company's working:—

Held, that the covenant was not simply collateral, but affected the nature and value of the land and ran with the land, and that although the surface owners were not parties to the lease, yet under s. 5 of the Real Property Act, 1845, and s. 58, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, the benefit of the covenant might be taken by the devisees of one who was a surface owner at the date of the lease and by the successors in title of others who were surface owners at that date, and that they could sue the executors of the lessee and the colliery company for compensation for damage done to their surface lands.

Decision of the Court of Appeal, [1908] 1 K. B. 629, affirmed.

Quære, whether s. 5 of the Real Property Act, 1845, is confined to covenants running with the land.

THE facts material to this report are stated in the judgment of Lord Macnaghten. The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.), affirming the decision of Ridley J., held that the covenant to pay compensation could be sued on by the plaintiffs, whose respective lands had been damaged by the working of the coal demised. Hence these appeals, which were heard together.

June 25, 29. *Tindal Atkinson, K.C.*, and *Compston*, for the appellants in all the appeals. The covenant cannot be sued on by any of the plaintiffs for two reasons—because it is a collateral and personal covenant and does not run with the land, and also because it is not made with any of the plaintiffs who are suing upon it. What is the meaning of the expression "owners and occupiers for the time being"? Is the time referred to the date of the lease or of the damage? Such a covenant will not bind or be available for future owners: *Kelsey* v. *Dodd*. (1) On the true construction the covenant does not come into operation until there is damage. It is a covenant in certain circumstances to pay damages and cannot be construed as having been made with unascertained or unascertainable persons. The case is wholly different from *Vernon* v. *Smith* (2), where the covenant was to

(1) (1881) 52 L. J. (Ch.) 34. (2) (1821) 5 B. & Ald. 1.

H. L. (E.) 1908

DYSON v. FORSTER.

DYSON v. SEED, QUINN, MORGAN, &c.

pay or provide a sum of money. The covenant does not touch the thing demised, though it may touch the beneficial occupation: see Bramwell B. in *Thomas* v. *Hayward*. (1) Channell B. uses words to the same effect. In *Martyn* v. *Williams* (2) Martin B., speaking of a claim for damages under a covenant similar to the present, said, "It is merely a chose in action which is not by law transferable." The covenant here is purely collateral, and Farwell J.'s language in *Rogers* v. *Hosegood* (3) is too general. It is not enough that it affects the covenantee in his occupation of the land. [They cited *Vyvyan* v. *Arthur* (4) and *Raymond* v. *Fitch*. (5)]

Scott Fox, *K.C.*, and *Simey*, for the respondents in the first appeal. The covenant was made with persons who were not parties to the deed. But that difficulty is met by statute. It is sufficient for the respondents' case that the covenant is "respecting lands or hereditaments" within the Real Property Act, 1845, s. 5, and the Conveyancing Act, 1881, s. 58. It also runs with the land within the principles of *Spencer's Case* (6) and cases there discussed. The rules laid down by Farwell J. in *Rogers* v. *Hosegood* (3), approved by the Court of Appeal, are sound. In *Tulk* v. *Moxhay* (7) a covenant between vendor and purchaser that the purchaser shall use or abstain from using land in a particular way was held to be binding in equity on the purchaser whether or not it ran with the land. Restrictive covenants were similarly enforced in *Spicer* v. *Martin*. (8) In *Lord Southampton* v. *Browne* (9) the person suing was not a party to the demise and was not entitled to the benefit of the covenants. The covenant here was with the existing owners; at all events they were included. If that construction is the right one the plaintiffs can sue. It is a covenant "relating to land" and is deemed to be made with the covenantee, his heirs and assigns: Conveyancing and Law of Property Act, 1881, s. 58, sub-s. 1.

(1) (1869) L. R. 4 Ex. 311.
(2) (1857) 26 L. J. (Ex.) 117.
(3) [1900] 2 Ch. 388.
(4) (1823) 1 B. & C. 410.
(5) (1835) 2 C. M. & R. 588.
(6) (1582) 5 Rep. 16; 1 Sm. L. C., 11th ed. p. 55.
(7) (1848) 2 Ph. 774.
(8) (1888) 14 App. Cas. 12.
(9) (1827) 6 B. & C. 718.

Manisty, K.C., and *Meynell*, for the respondents in the other appeals.

Atkinson, K.C., in reply.

Dec. 8. LORD LOREBURN L.C. My Lords, in this case I have had the advantage of reading in print the opinion of my noble and learned friend Lord Macnaghten. I entirely agree with him and there is nothing that I need to add.

LORD MACNAGHTEN. My Lords, in 1871 the predecessors in title of the Ecclesiastical Commissioners for England conveyed to one Forster in fee simple certain lands in the county of Durham, reserving all mines with power to work the minerals from below, making reasonable compensation for such damage as might be occasioned to the surface.

In 1887 the Ecclesiastical Commissioners demised to one Crawford seams of coal and other minerals under the lands conveyed to Forster, and under adjoining lands. The lease contained a covenant on the part of the lessee expressed to be made with the "owner or owners, occupier or occupiers for the time being," of the surface to pay compensation for all damage occasioned by the lessee in working the mines or seams of coal thereby demised.

In 1896 Crawford's lease was assigned to a company called the Elvet Colliery Company, Limited, which is now in liquidation.

It is admitted that the mines have been worked so as to occasion damage to the surface of the lands conveyed to Forster. This action has been brought to recover compensation.

The plaintiffs are devisees of Forster and his successors in title. The substantial defendants are the legal personal representatives of Crawford, who died in November, 1900.

The defence is twofold. In the first place the defendants say that Forster's assigns cannot take advantage of the covenant because the surface owners were not parties to the indenture in which the covenant is contained. Secondly they say that the covenant does not run with the land, and that therefore Forster's assigns could not have had the benefit of the covenant even if Forster himself had been named a party to the indenture.

H. L. (E.) 1908 — DYSON v. FORSTER. DYSON v. SEED, QUINN, MORGAN, &c. — Lord Macnaghten.

The Court of Appeal rejected both defences. In my opinion they were right. The first objection is, I think, answered by s. 5 of 8 & 9 Vict. c. 106. That section enacts that a stranger may take the benefit of a covenant respecting any tenements and hereditaments although the taker be not named a party to the indenture. The Court of Appeal held that that provision only applied to covenants running with the land. They held, however, that this covenant did run with the land, and so was within the section. Whether the section must be confined to covenants running with the land may perhaps be doubted. The point, however, is not, I think, material in the present case, because I agree with the Court of Appeal in thinking that the covenant in question is one which runs with the land.

The question is, Does this covenant affect the nature, quality, or value of the land, or is it a covenant simply collateral? It is not, I think, simply collateral, for one reason which is sometimes proposed as a test for the purpose of determining whether a covenant runs with the land or not. It is beneficial to the surface owner and beneficial to no one else: see *Vyvyan* v. *Arthur*. (1) I think it affects the nature and also the value of the land. I think it affects the nature of the land because it tends to prevent disturbance of the surface, and so it tends to preserve the natural state and condition of the land. A person who has agreed to pay compensation to his neighbour for injuriously affecting his land is more likely to be careful to avoid mischief than one who is not answerable for the consequences of his act. I also think that the covenant affects the value of the land in respect of which it was given. Suppose the land, being properly drained, were to be let for agricultural purposes, a tenant, I should suppose, would be more likely to take it and would probably give more for it if he were assured that compensation would be payable in the event of the drainage system being dislocated by subsidence. Similar considerations would apply if the land were to be let for building purposes.

I am therefore of opinion that the decision of the Court of Appeal should be upheld and the appeal dismissed with costs. The same question is involved in the other cases which were

(1) 1 B. & C. 417, per Best J.

set down with the case of *Dyson* v. *Forster*, and the same result must follow.

LORD DUNEDIN. My Lords, I concur in the judgment which has just been pronounced. I confess, coming as one who has been bred in a system of conveyancing foreign to that with which we are dealing, the impression on my mind is very strong that the case might have been disposed of on the statute alone, but I am satisfied, in view of the opinions of the learned judges in the Court of Appeal, that it is safer to put it upon the ground which has been taken by my noble and learned friend Lord Macnaghten.

LORD LOREBURN L.C. My Lords, Lord Halsbury and Lord James of Hereford take the same view.

Orders of the Court of Appeal in all the appeals affirmed and appeals dismissed with costs.

Lords' Journals, December 8, 1908.

Solicitors: *Van Sandau & Co., for Belk, Cochrane & Belk, Middlesbrough; Dangerfield & Blythe, for T. & W. G. Maddison, Durham; Worthington Evans, Dauney & Co., for T. Jones & Burrell, Durham.*

[HOUSE OF LORDS.]

H. L. (E.) 1908 — *Nov.* 12, 16; *Dec.* 10.

BLAKISTON . . . . . APPELLANT;

AND

COOPER (SURVEYOR OF TAXES) . . . . . RESPONDENT.

Revenue—Income Tax—Office or Employment of Profit—Incumbent of Benefice—Profits accruing by reason of Office—Easter Offerings—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 146; *Sched. E, rr.* 1—4.

Voluntary Easter offerings of money given as a freewill gift to the incumbent of a benefice as such for his personal use are, if given for the purpose of increasing his stipend, assessable to income tax as "profits accruing to him by reason of his office" under Sched. E, r. 1, of the Income Tax Act, 1842.

Decision of the Court of Appeal, [1907] 2 K. B. 688, affirmed.

THE Easter offerings for 1905 received by the vicar of East Grinstead amounted to 56*l.*, of which the greater part had been collected by the churchwardens in the parish church on Easter Sunday, and the rest at other times and places, or received by the vicar personally. Among the givers were Churchmen, Nonconformists, friends, parishioners, and strangers, who appeared to have given for divers reasons—personal regard and esteem for a zealous and popular vicar, recognition of good work and long service, and the like. The gifts were perhaps stimulated by a published letter from the bishop of the diocese (set out verbatim in the reports of the decisions below) pointing out that the parochial clergy were seldom sufficiently endowed and requesting that the collections on Easter Day, 1905, should be devoted to the personal use of the incumbent and as a personal, non-official freewill gift, due notice being given beforehand that all such gifts should be given on this express understanding. Notices to the effect that all sums given in the collection or sent to the churchwardens afterwards would be given and sent "on that understanding only" were duly placed in the church pews.

Bray J. affirmed a decision of the Income Tax Commissioners that the sum of 56*l.* was not assessable to the income tax. (1)

(1) [1907] 1 K. B. 336.

These decisions were reversed by the Court of Appeal (Lord Alverstone C.J., Fletcher Moulton and Buckley L.JJ.). Hence this appeal by the vicar.

Nov. 12, 16. *Danckwerts*, *K.C.*, and *Austen-Cartmell*, for the appellant. By the Income Tax Act, 1842, s. 146, Sched. E, rr. 1—4, income tax is to be charged on all persons holding public offices and employments of profit (including those held under any ecclesiastical body whether aggregate or sole) for all "salaries, fees, wages, perquisites or profits whatsoever accruing by reason of such offices, employments or pensions." Each of the words "salaries, fees, wages, perquisites" expressly or impliedly denotes payments to which there is a right which can be enforced. "Profits" are named as in the same class. If gratuities or voluntary gifts were meant to be included it would have been natural and right to name them specially.

The offerings in this case were gratuities, not a salary or fees, or wages, or perquisites or profits. They do not come under any of the descriptions to which income tax is attached. They were not received in virtue of the appellant's office, but, as the bishop wrote, were "a personal, non-official freewill gift"; it was "on this express understanding" that the offerings were made. The gifts were strictly personal, to the individual, not to the vicar. The appellant's being incumbent of the parish was, it is true, a causa sine qua non; it was not the causa causans.

It is this absolutely unofficial character which differentiates the present case from *Herbert* v. *McQuade*. (1) There the clergyman had for several years received an annual grant from the diocesan branch of the Queen Victoria Clergy Sustentation Fund, a chartered corporation. It was, in the words of Collins M.R., an "emolument attached to the benefice"; with "the question of personal income . . . . the society does not deal." The source of the endowment was the central fund of a widely diffused organization, not, as here, presents made by one person to another. Similarly in *Poynting* v. *Faulkner* (2) there was a "ministers' stipend augmentation fund" administered

(1) [1902] 2 K. B. 631 (2) (1905) 93 L. T 367.

H. L. (E.) 1908

BLAKISTON v. COOPER.

by a committee and distributed in aid of the income of such ministers as the committee in its discretion might select. On the other hand, in *Turner* v. *Cuxon* (1) an annual grant, renewable on the discretion of the council, of the Curates' Augmentation Fund was held not assessable. If the Income Tax Act, 1842, really contemplated taxing gratuities, is it likely that the astute officials would have allowed them to escape taxation till quite recently? [They also referred to *Inland Revenue Commissioners* v. *Strang* (2) and *Turton* v. *Cooper*. (3)]

Sir W. S. Robson, A.-G., and *Sir S. T. Evans, S.-G.* (*W. Finlay* with them), for the respondent. The sum of 56*l.* was clearly a perquisite or profit accruing to the vicar by reason of his office. It was a return for services rendered, intended, no doubt, for "the personal use of the incumbent," as the bishop wrote in his letter of March, 1905; but all salaries or profits are equally for the benefit of the person who receives or earns them. The bishop's letter of February, 1904, clearly shews that these were not casual gifts, for he describes them as "the laudable custom," "the plain duty of the laity"; the help is to be given not to the clergy as persons, but to help "the inadequate incomes" of the clergy. The popularity and personal character of the vicar are irrelevant and excluded by the bishop's letters from consideration. In *Turner* v. *Cuxon* (1) Coleridge C.J. found that the gift was honoris causa, and there was a condition attached—that the curate should himself collect for the fund.

The case is in all respects similar to *Poynting* v. *Faulkner* (4) and *Herbert* v. *McQuade*. (5) The donations were a response to an official systematized appeal which had nothing of a personal character about it.

Danckwerts, K.C., in reply.

The House took time for consideration.

Dec. 10. LORD LOREBURN L.C. My Lords, I agree with the Court of Appeal. The only question is whether or not a sum

(1) (1888) 22 Q. B. D. 150.
(2) (1878) 15 Sc. L. R. 704.
(3) (1905) 92 L. T. 863; 5 Tax Cases, 138.
(4) 93 L. T. 367.
(5) [1902] 2 K. B. 631

given by parishioners and others to the vicar at Easter, 1905, is assessable to income tax as being "profits accruing" to him "by reason of such office."

In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present.

In this case, however, there was a continuity of annual payments apart from any special occasion or purpose, and the ground of the call for subscriptions was one common to all clergymen with insufficient stipends, urged by the bishop on behalf of all alike. What you choose to call it matters little. The point is, what was it in reality?

It was natural, and in no way wrong, that all concerned should make this gift appear as like a mere present as they could. But they acted straightforwardly, as one would expect, and the real character of what was done appears clearly enough from the papers in which contributions were solicited.

LORD ASHBOURNE. My Lords, the question in this case is a short one, and it naturally is of much interest to the clergy and to many who are interested in their welfare.

Are Easter offerings assessable to income tax as profits accruing by reason of the office of vicar? The Court of Appeal unanimously held in the affirmative, being of opinion that they were made to the vicar as vicar.

These offerings had been made for several years to the appellant, the vicar of East Grinstead. They were made in response to a systematic appeal initiated by the bishop and supported by the churchwardens to induce collections to eke out slender stipends. People were urged, it is true, to subscribe as a personal freewill gift, the contributions were wholly voluntary, and the amount given was regulated entirely by the discretion of

H. L. (E.) 1908

BLAKISTON v. COOPER.

Lord Ashbourne.

the subscribers. But in what character did the appellant receive them? It was suggested that the offerings were made as personal gifts to the vicar as marks of esteem and respect. Such reasons no doubt played their part in obtaining and increasing the amount of the offerings, but I cannot doubt that they were given to the vicar as vicar and that they formed part of the profits accruing by reason of his office. The bishop was naturally anxious to increase the scanty stipends of ill-paid vicars. The whole machinery was ecclesiastical—bishops, churchwardens, church collections—and I am unable to see room for doubt that they were made for the vicar because he was the vicar, and became, within the statute, part of the profits which accrued to him by reason of his office. I can sympathize with the Lord Chief Justice in arriving at the conclusion, but I think that the appeal should be dismissed.

LORD ROBERTSON. My Lords, I am clearly of opinion that this judgment is right.

When the broader facts of the case are remembered, I confess that it savours of paradox to say that this money did not accrue to the appellant by reason of his office of vicar of East Grinstead. The cause of collecting the money was to supplement the legal income of the vicar, and, while this is the ordinary history of Easter offerings, in the present instance the thing is set out in black and white in the bishop's letter and the subsequent notices. The money is collected in church (the offertory being part of the service) and is placed on the altar, the contributions of those unable to attend being handed to the vicar or the churchwardens.

As I have said, the bishop's letter makes quite manifest what without it was sufficiently plain. It is, be it observed, a circular letter, and applies not to the appellant alone, but to each and every incumbent in the diocese. Its avowed object is to make up to the clergy the fall in their official incomes. It bases the appeal on the Christian duty incumbent on the people. While written with every desire to protrude the personal element, with a view to the present question, the letter does not conceal, but on the contrary demonstrates, that it is in virtue of his office

that each clergyman is to take the offering which it was written to advocate.

LORD COLLINS. My Lords, I am of the same opinion.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 10, 1908.

Solicitors: *Hare & Co.; Sir Francis C. Gore, Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

GREAT EASTERN RAILWAY COMPANY . APPELLANTS;

AND

LORD'S TRUSTEE . . . . . RESPONDENT.

Bill of Sale—Carriers' Lien—Agreement giving Credit to Trader for Carriage of Goods subject to Preservation of Lien—Goods on Land in Tenancy of Trader—Detainer of Goods—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.

A railway company by a "ledger agreement" opened a credit account with a coal merchant for the carriage of his coal, the company to have a continual lien upon the coal conveyed on their lines or being at any time on ground rented of the company for all charges due to them, and to be at liberty to sell and dispose of any of the coal to satisfy the lien, with the right to close the account by giving one day's notice. By separate agreements the company let to the merchant allotments within the railway yard for the purpose only of stacking and dealing with the coal. The company had the keys of the yard gates and kept them locked at certain times. The payments being in arrear, the company closed the account, locked the gates, and detained the coal:—

Held by Lord Loreburn L.C. and Lords Macnaghten and Atkinson (Lords Robertson and Collins dissenting), that the inference of fact from the circumstances was that both parties intended the company's right of detainer to be preserved and if necessary enforced against the coal while in the railway yard; that the ledger agreement conferred no licence to take possession of personal chattels or charge or equity thereon and was not a bill of sale within the Bills of Sale Acts; and

H. L. (E.)
1908
GREAT EASTERN RAILWAY v. LORD'S TRUSTEE.

that the trustee in the merchant's bankruptcy had no claim against the company in respect of the detainer.

Decision of the Court of Appeal on the above point, [1908] 2 K. B. 54, reversed, and decision of Phillimore J., [1908] 1 K. B. 193, thereon restored.

THE facts material to this appeal are stated in the judgment of Lord Macnaghten. The lien clauses of the ledger agreement ran as follows:—

"(3.) The company to have a continual lien upon all waggons, goods, minerals, articles and things hauled or conveyed on their lines, or which shall be at any time upon the railway or upon any ground allotted by or rented of the company for all tolls, rates, charges and moneys which shall be or become due or payable to the company as well as in respect of the particular waggons, goods, minerals, articles or things which from time to time may be so carried as in respect of all waggons, goods, minerals, articles and things which shall at any time have been hauled or conveyed along or be upon the railway or any part thereof, and the company to be at liberty from time to time and in such manner as they shall think fit, to sell and dispose of all or any of such waggons, goods, minerals, articles and things in order to satisfy any such lien.

"(4.) The company reserve to themselves the right to close the account at any time upon giving one day's notice in writing of their intention to do so, whereupon the whole of such account shall become immediately payable."

The Court of Appeal (Cozens-Hardy M.R. and Buckley L.J., Fletcher Moulton L.J. dissenting) held that the ledger agreement was a bill of sale and void for want of registration, thus reversing the decision of Phillimore J. on that point. Hence this appeal.

Upon the question of set-off which arose out of Lord's bankruptcy and was dealt with in the Courts below this House expressed no opinion.

Oct. 20, 26. *Scrutton, K.C.*, and *Coller*, for the appellants. The ledger agreement was not a bill of sale and did not require registration. The appellants had, it is admitted, a lien on the coal in the trucks. They had also by the ledger agreement a

lien on the coal in the allotments; they had never parted with possession and they exercised physical control. The case is almost precisely similar to *Spencer* v. *Midland Ry. Co.* (1) For this purpose there is no difference in principle between a tenancy and a licence. The company's right was not an equitable right to take possession, but a common law right to retain a possession with which they had never parted. It was like the possession taken by the auctioneer who under a written agreement paid out the sheriff in *Charlesworth* v. *Mills.* (2) The possession by the company of the coal was as real as in *Ex parte Hubbard* (3), where the pledgor delivered the goods to the pledgee under a document which was held not to be a bill of sale. That case was referred to with approval by Lord Halsbury in *Charlesworth* v. *Mills.* (2) There was here a retention of the goods as in *Morris* v. *Delobbel-Flipo* (4), decided by Stirling J. shortly before this House reversed the decision of the Court of Appeal in *Charlesworth* v. *Mills* (2): see Lord Herschell's judgment in *Charlesworth* v. *Mills* (2) and Lord Chelmsford's in *Schotsmans* v. *Lancashire and Yorkshire Ry. Co.* (5)

Herbert Reed, K.C., and *Frank Mellor*, for the respondent. The whole question turns upon the effect to be given to the ledger agreement, from which the appellants derived all their rights and powers. This distinguishes the case from *Spencer* v. *Midland Ry. Co.* (1), where the goods were in fact in the company's possession. Here the coal was in Lord's possession; he could enter the premises and remove as much coal as he liked without the appellants' permission during business hours. The company's right to close the gates came from the agreement alone, and the mere fact that the allotments were on the company's land has no bearing on the construction of the agreement. The goods were in the possession and under the control of Lord, and the lien conferred by the agreement was an equitable right. The agreement was therefore void for want of registration as a bill of

(1) (1895) 11 Times L. R. 408. See Lord Russell C.J.'s judgment, affirmed 11 Times L. R. 542, where a licence to use ground for the storage of goods was held not to be a bill of sale.
(2) [1892] A. C. 231.
(3) (1886) 17 Q. B. D. 690.
(4) [1892] 2 Ch. 352.
(5) (1867) L. R. 2 Ch. 332.

H. L. (E.) 1908 GREAT EASTERN RAILWAY v. LORD'S TRUSTEE.

sale. *Morris* v. *Delobbel-Flipo* (1) is inapplicable, inasmuch as the goods were under the exclusive control of the plaintiff seeking to enforce his right to them. The last paragraph of Buckley L.J.'s judgment is conclusive of the whole matter.

Coller, in reply.

The House took time for consideration.

Dec. 14. LORD LOREBURN L.C. My Lords, there has been an even division of opinion among the judges who have heard this case. In my view the judgment of Phillimore J. ought to be restored.

I think the railway company were in possession of this coal. The whole object of the arrangement made between them and Lord was that they should retain a lien and a physical control, secured by retaining the coal within their yard, of which they could lock the gates if Lord was in arrear. It is perfectly consistent with this that Lord also should have the right to remove the coal when the railway company opened their gates for him, as they were bound to do when Lord was not in arrear. I have heard no answer to the observations of Moulton L.J. when he points out how an innkeeper has an effective lien over the luggage of his guest, though the guest is allowed to take out of it or put into it his articles of clothing while in the inn. True, there was a demise to Lord of an allotment in the yard whereon this coal was stacked. That entitled him to occupy the allotment. But did that occupation confer upon him the exclusive possession of everything he placed on the allotment? I cannot see why it should. An officer may be in possession of goods whether the debtor has a lease or even the freehold of the house in which the goods are placed. I cannot perceive any necessary dependency between the occupation of a piece of land and the exclusive possession of chattels which lie on it. Nor, in my opinion, can it signify for this purpose whether the occupation of the land is under a demise or merely by licence. How can the quality of the tenure of the land determine the possession of the chattels?

(1) [1892] 2 Ch. 352.

If this be so, the Bills of Sale Act does not apply. There is here no right in equity nor charge nor any licence to take possession of goods. There is already possession and at law. The agreement merely gives a right to retain it.

I should have been very sorry had I felt obliged to hold that an arrangement so convenient and so harmless was frustrated by an Act designed to defeat very different transactions.

LORD MACNAGHTEN. My Lords, before his bankruptcy Frederick Lord carried on business at Norwich as a coal merchant under the style or firm of Lord Brothers. His supplies of coal came by the Great Eastern Railway. Everybody knows what the rights of carriers are in the absence of special agreement. On payment of what may be due for freight the carrier is bound to deliver to the consignee. The presumption is that payment and delivery are to be concurrent. Unless payment is forthcoming the carrier has a right to withhold delivery and to detain the goods. At the same time in the case of railway companies and their regular customers it would be most inconvenient if the carrying company were to stand on its strict rights and insist upon ready money on the delivery of each consignment. It would be inconvenient to the customer and even more so to the company. What was done in this case is, I believe, in accordance with common practice. At Lord's request the appellants agreed to open a monthly credit account in their ledgers for the carriage of his coal. Among the conditions on which the account was opened were these: The appellants were to have a general lien for the balance of the account, and they were to be at liberty from time to time and in such manner as they should think fit to sell the goods subjected to their lien. It was further provided that they might close the account on one day's notice; and as part of the same arrangement, but by separate contracts, the appellants agreed to let to Lord certain spaces or allotments within their own yard, which were to be used for the purpose only of stacking and dealing with coal and coke passing over their railway.

Lord fell into arrear. Over and over again he promised to discharge his liability. He failed to perform his promises.

H. L. (E.) 1908

GREAT EASTERN RAILWAY v. LORD'S TRUSTEE.

Lord Macnaghten.

Ultimately the appellants closed the account. They then shut the gates of their yard and so prevented Lord from removing the coal which happened to be lying on his allotments at the time.

Were the appellants within their rights in taking this step? That must depend upon the answer to another question. Was there an absolute and unconditional delivery of the coal, or was it intended that the company should keep a hold over the coal so long as their account remained open, and, if so, were sufficient precautions taken to give effect to that purpose if the company chose to exercise the right of stoppage for which they bargained? There is a question of intention and a question of fact.

That seems a short and simple point. Now in the first place it appears to me absurd to suppose that the parties had in view any equitable right such as a charge on future property to be enforced by proceedings in Chancery. The company, I suppose, wanted some rough and ready means of enforcing an undisputed claim; not the protracted pleasure of a Chancery suit. It is, I think, equally absurd to suppose that the appellants would have been content with an agreement plainly illusory. They were business people. They must have known what the effect of unconditional delivery would be. But then it is said, be that as it may, Lord had possession of the coal. So he had in a sense—in the sense in which the owner of dutiable goods has possession of them while they are stored in a bonded warehouse belonging to him as owner or tenant. It is said that Lord not only had possession of the coal, but also an estate in the land on which the coal was deposited. I cannot see what the tenure of the land has to do with the question. If the delivery was absolute and unconditional it cannot matter where the goods were deposited or what Lord did with them. If the delivery was not unconditional the question must be, Had the goods passed out of reach or were they still within the grasp of the company? What was the real meaning of the arrangement between the company and Lord? It seems to me that the thing speaks for itself. The proper inference from the facts and circumstances of the case is, I think, that it was the intention of both parties that the company's right of detainer should be

preserved and if need be enforced against the coal subjected to their lien so long as it remained in their yard. It is hardly conceivable that the company would have allowed this ledger account to be opened if Lord's depôt for coal had been outside their precincts.

I cannot help thinking that there has been some little confusion between the right of retainer in the case of a person's own goods sold, but not paid for, and the right of detainer in the case of work and labour bestowed on the goods of another person. The two rights are not perhaps quite the same. At any rate they arise under different circumstances, and it is not, I think, every observation you find applied to the one that is applicable to the other.

It was argued that the ledger agreement was really a bill of sale and void because it is not in the form prescribed by the Bills of Sale Act, 1882. It can hardly be contended that the agreement is within the mischief at which the Act was aimed; nor is it, I think, within the definition of a bill of sale contained in the Act of 1878 and adopted in the later Act. It did not confer or purport to confer a right in equity to any personal chattels or to any charge or security thereon or any equitable interest of any sort. The right which was in the contemplation of the parties was a right to detain goods so long as the power of detention remained. The appellants were, I think, in a position to exercise that right, and they certainly did exercise it effectively. The trustee can have no higher right than Lord himself would have had if he had not become bankrupt. In the face of his agreement, how could he have said to the appellants "You shall open your gates and let me take my goods away, though I promised you should have the right of detaining them so long as I owed you money for freight"?

Again, the agreement is not a licence to take possession of personal chattels. It is only a right to detain the chattels under certain circumstances coupled with an authority to sell. It seems to me that the company would have no difficulty in acting on that authority as soon as the tenancy came to an end as it would in accordance with the ledger agreement on the bankruptcy of the lessee.

H. L. (E.) 1908

GREAT EASTERN RAILWAY v. LORD'S TRUSTEE.

I am therefore of opinion that the appeal must be allowed and the decision of Phillimore J. restored with costs here and below.

LORD ATKINSON. My Lords, I have had the advantage of reading the judgment delivered by my noble and learned friend on the woolsack and also that delivered by my noble and learned friend Lord Macnaghten, and I entirely concur in the conclusion at which they have arrived.

LORD COLLINS. My Lords, I am of opinion that the decision of the Court of Appeal was right, and for the reasons given by the Master of the Rolls and Buckley L.J. It seems to me, with deference, that underlying the differing judgment of Moulton L.J. is the fallacy that juxtaposition giving facilities for exercising a contractual right of lien is equivalent to possession of the thing over which the right of lien is claimed. If the goods are so situate that the person asserting the lien can only justify it by virtue of an agreement in writing, then his legal position will fall to be determined by reference to the question whether the document comes within the statutory definition of a bill of sale. The law on this matter was settled more than twenty years ago by a series of decisions of which *Ex parte Parsons* (1) and *Ex parte Hubbard* (2), one on each side of the line, are perhaps the most instructive. No doubt the railway company had possession of the goods for the purpose of carriage, and as long as they held such possession could have exercised their lien upon them, and it would have been immaterial that the terms on which their lien should be exercised had been reduced to writing: see *Charlesworth* v. *Mills*, per Lord Herschell. (3) But when the transit was over and the goods delivered the right of lien incident to the transaction itself was lost, and any further right to exercise a lien would have to be justified by virtue of some agreement sanctioning a retaking of possession. It seems to me that that is exactly what happened in this case. As soon as the goods were delivered to Lord on

(1) (1886) 16 Q. B. D. 532. (2) 17 Q. B. D. 690.
(3) [1892] A. C. at p. 243.

his own allotment, held by him as tenant under a demise, they ceased to be actually or constructively in the possession of the company, and mere juxtaposition, though it might give facilities, could give them no rights to resume possession, though they might have, and in fact had, a contractual right to do so under what has been called the ledger agreement. If so, it is not, I think, disputed that they would come within the Bills of Sale Acts.

It was indeed contended by Mr. Scrutton that the document here in discussion was not in fact a bill of sale, and that it stood outside the mischief aimed at by the Legislature in those enactments. But this argument has been frequently adduced and as often overruled before: see the observations of Lord Halsbury L.C. in *Charlesworth* v. *Mills* (1), of Lord Esher M.R. in *Ex parte Hubbard* (2), and of Lindley L.J. in *Ex parte Parsons* (3), where it is pointed out that the different Bills of Sale Acts were passed from quite different standpoints, and that honest transactions are hit by them as well as dishonest. The analogy of the innkeeper's lien does not seem to me to carry the case any further. It is not suggested that it extends to goods which have ceased to be in possession of the innkeeper, or that the latter by virtue of his lien could retake them when he had caused or suffered them to be passed off his premises on to those of his late guest. His defence to an action for doing so would have to be something outside the innkeeper's lien amounting at least to leave and licence, which if reduced to writing would have to be produced.

LORD ROBERTSON. (Read by LORD LOREBURN L.C.) My Lords, I agree in the judgment of Lord Collins.

I find it impossible to affirm that these coals were in the possession of the appellants, or to deny that they were in the possession of Lord. The ground on which they were placed was demised to Lord for the purposes of his trade, to use the language of the agreement, for the purpose only of stacking and dealing with coal and coke passing over the appellants' railway.

(1) [1892] A. C. at p. 235. (2) 17 Q. B. D. 690, at p. 696.
(3) 16 Q. B. D. 532, at p. 546.

H. L. (E.) 1908 GREAT EASTERN RAILWAY v. LORD'S TRUSTEE.

It is quite true that no exit existed except through the appellants' ground, and that this gave the appellants a strategic advantage in compelling redelivery. But I have been unable to satisfy myself on principle or on authority that such considerations of intention or convenience can take the place of possession.

Order of the Court of Appeal (so far as complained of) reversed and Judgment of Phillimore J. (thereby in part reversed) restored with costs here and below, except the costs of the set-off before Phillimore J., to be paid by the appellants to the respondent, these costs to be set off one against the other.

Lords' Journals, December 14, 1908.

Solicitors: *E. Moore; Tarry, Sherlock & King, for E. E. Blyth, Norwich.*

[HOUSE OF LORDS.]

H. L. (E.) 1908 *Oct.* 27; *Dec.* 14.

GENERAL BILLPOSTING COMPANY, LIMITED . . . . . APPELLANTS;

AND

ATKINSON . . . . . RESPONDENT.

Master and Servant—Contract of Service—Restriction on Trade—Wrongful Dismissal—Right of Servant to treat Wrongful Dismissal as Repudiation and to sue for Breach of Contract—Mutual and Independent Covenants.

Employers agreed with their manager that he should hold office subject to termination at twelve months' notice by either party and with a restriction on his right to trade after its termination. The employers having wrongfully dismissed him without notice:—

Held, that he was entitled to treat the dismissal as a repudiation of the contract and to sue them for damages for breach of contract, and was no longer bound by the restriction on trade.

Decision of the Court of Appeal, [1908] 1 Ch. 537, affirmed.

THE respondent was manager to a Newcastle billposting company for some years upon the terms stated in the head-note. The restriction on trade was that he should not whilst in the

engagement or within two years after its termination carry on a similar business within a certain radius without the company's permission. In 1906 the company dismissed him without notice. In an action against the company for wrongful dismissal he recovered damages, and afterwards began to trade as a billposter on his own account within the radius. The appellants, as assignees of the Newcastle company, brought an action against the respondent for an injunction and for damages for breach of contract. Neville J. held that the appellants were entitled to sue the respondent for damages notwithstanding the wrongful dismissal. This decision was reversed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ.). Hence this appeal.

Oct. 27. *C. A. Russell, K.C.*, and *G. M. Hildyard*, for the appellants. The two covenants, to give notice and not to engage in another business, are wholly independent of each other. They are not what Lord Mansfield C.J. calls in *Boone* v. *Eyre* (1) "mutual covenants" which go to the whole of the consideration and the performance of one of which is a condition precedent of the other. In *Pordage* v. *Cole* (2) it was held that if B. agreed to pay A. a sum of money on a particular day for his lands, this amounts to an agreement by A. to convey those lands, and A. may bring an action for the money before a conveyance is made. That doctrine is applicable here. A dismissal which turns out to have been wrongful is not equivalent to a repudiation of the whole contract. If there had been no stipulation for a certain notice a reasonable notice would have been necessary, and the length of such notice would have been a question for the jury. In any case the absence or inadequacy of notice is compensated in the damages awarded. The passage cited below by Cozens-Hardy M.R. from Bowen L.J.'s judgment in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (3) refers to another question and other circumstances. In a case somewhat resembling the present, *Proctor* v. *Sargent* (4), it was suggested by the Court that the breach of the one covenant might justify a

(1) (1779) 1 H. Bl. 273, n.
(2) (1669) 1 Wms. Saund. 319 l.
(3) (1888) 39 Ch. D. 339, 365.
(4) (1840) 2 Man. & G. 20.

H. L. (E.) 1908

GENERAL BILLPOSTING COMPANY, LIMITED v. ATKINSON.

cross-action on the other. What amounts to a repudiation of a contract is illustrated by *Johnstone* v. *Milling*. (1) There was here no such repudiation by the appellants.

On the question whether the performance of one covenant is a condition precedent to the enforcement of the other see Bramwell B.'s judgment in *White* v. *Beeton*. (2) He said that whether covenants were independent or interdependent varied with time and circumstance, and that the observance of a covenant might at one moment be a condition precedent of the other, and at another time not. Here the breach by the appellants did not amount to total repudiation of the contract. The respondent in effect has had the whole of his consideration; as much so as if he had had the twelve months' notice. The appellants, on the other hand, have not had the consideration for which they bargained, and are entitled to it in the form of an injunction and damages.

Manisty, K.C., and *Dighton Pollock*, for the respondent. The covenants in the contract were mutual and interdependent. The question is one of construction and consideration of the circumstances. The wrongful dismissal of the respondent was a repudiation of the whole contract. The appellants have had his services in return for his salary, but they have not performed their part, for they stipulated to give twelve months' notice. The engagement did not terminate in the manner contemplated by both parties.

C. A. Russell, K.C., in reply.

The House took time for consideration.

Dec. 14. EARL OF HALSBURY. My Lords, I have had the opportunity of reading the judgment prepared by my noble and learned friend Lord Collins, and I entirely concur with it and feel it not necessary to add anything myself.

LORD ROBERTSON. (Read by LORD LOREBURN L.C.) My Lords, if this case be considered for a moment on its own merits and substance (apart in the meantime from authority) it is extremely difficult to be reconciled to the appellants' contention. The

(1) (1886) 16 Q. B. D. 460. (2) (1861) 7 H. & N. 42.

respondent's position in entering the contract is a very intelligible one. He says, "I am a bill-poster and I desire occupation either on my own account or in the service of others. If I enter the employment of others I am willing to give up the right to trade on my own account to the extent specified in this agreement. I do not desire to have it both ways." The claim of the appellants, on the other hand, as now put forward, is that, taking him at his word, as expressed in the contract, and getting his services, they are to be entitled both to deprive him (against the contract) of the right to serve them and also of the right to serve himself.

It seems to me that the covenant not to set up business is not only germane to but ancillary to the contract of service, and that once the contract of service is rescinded the other falls with it.

I have only to add that the suggestion that the respondent has already received his quid pro quo in that he has had the appellants' wages for a considerable time ignores the equally important fact that they have had his services for the same period.

Lord Collins. My Lords, I am of opinion that the unanimous decision of the Court of Appeal in this case should be affirmed. The rule pressed upon us by Mr. Russell from the notes to *Pordage* v. *Cole* (1) "cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if in the case of *Boone* v. *Eyre* (2) two or three negroes had been accepted and the equity of redemption not conveyed we do not apprehend that the plaintiff could have recovered the whole stipulated price and left the defendant to recover damage for the non-conveyance": see per Pollock C.B. delivering the judgment of the Court in *Ellen* v. *Topp.* (3) Further, in *White* v. *Beeton* (4) Bramwell B. quotes with approval the remark of Lord Kenyon C.J. in *Campbell* v. *Jones* (5), "Whether these kinds of

(1) 1 Wms. Saund. 319 l.
(2) 1 H. Bl. 273, n.
(3) (1851) 6 Ex. 424, at p. 442.
(4) 7 H. & N. at p. 49.
(5) (1796) 6 T. R. 570.

H. L. (E.) 1908

GENERAL BILLPOSTING COMPANY, LIMITED v. ATKINSON.

Lord Collins.

covenants be or be not independent of each other must certainly depend on the good sense of the case." The reason for the rule itself is said by Serjeant Williams to be that "where a person has received a part of the consideration for which he entered into the agreement it would be unjust, that because he has not had the whole, he should be permitted to enjoy that part without either paying or doing anything for it." But in this case, as pointed out by Mr. Manisty, the respondent has given an equivalent in service for the remuneration he has received in salary. He stands, therefore, outside the reason of the rule.

But I think this case may be, and in fact has been, decided on broader lines than those laid down in the notes to *Pordage* v. *Cole* (1) as to mutual and independent covenants. I think the true test applicable to the facts of this case is that which was laid down by Lord Coleridge C.J. in *Freeth* v. *Burr* (2), and approved in *Mersey Steel Company* v. *Naylor* (3) in the House of Lords, "That the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract." I think the Court of Appeal had ample ground for drawing this inference from the conduct of the appellants here in dismissing the respondent in deliberate disregard of the terms of the contract, and that the latter was thereupon justified in rescinding the contract and treating himself as absolved from the further performance of it on his part.

I think the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 14, 1908.

Solicitors: *Robinson & Bradley, for Lundi, Shortt & Fenwicke, Newcastle-on-Tyne; Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-on-Tyne.*

(1) 1 Wms. Saund. 319 l. (2) (1874) L. R. 9 C. P. at p. 213.
(3) (1884) 9 App. Cas. 434.

[HOUSE OF LORDS.]

JOHN GEORGE . . . . . APPELLANT;

AND

GLASGOW COAL COMPANY, LIMITED . RESPONDENTS.

H. L. (Sc.)
1908
Nov. 9

Employer and Workman—Compensation—"Serious and wilful Misconduct"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 2 (*c*)—*Coal Mines Regulation Act*, 1887 (50 *&* 51 *Vict. c.* 58), *ss.* 49, 51, 52; *r.* 3.

By the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 2 (*c*), if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall . . . . be disallowed.

The appellant was a bottomer in the respondents' colliery. His working place was at a mid-working situate forty feet above the main coal bottom. The mid-working was a working to which No. 3 of the additional special rules of the Coal Mines Regulation Acts, 1887 to 1896 (50 & 51 Vict. c. 58 and 59 & 60 Vict. c. 43), applied. That rule was, inter alia, "That the bottomer shall not open the gate fencing the shaft until the cage is stopped at such mid-working." On the occasion when the accident happened the appellant called for the cage to ascend, and he, expecting the cage to stop at his level without any further signal being given, and acting on this assumption without ascertaining whether the cage had stopped, opened the gate guarding the shaft, went some three yards along the level behind a full hutch, and pushed the hutch forward to the shaft. The cage had passed the level without stopping, and the appellant pushed the hutch into the shaft and fell with it:—

Held, affirming the decision of the First Division of the Court of Session, that there was evidence on which a reasonable man could hold that the appellant had been guilty of "serious and wilful misconduct," and therefore the appellant was not entitled to compensation.

Observations *per* Lord Loreburn L.C. and Lord Robertson on the extent to which the breach of a rule may be prima facie evidence of misconduct.

APPEAL from an interlocutor by the First Division of the Court of Session, Scotland, dated May 27, 1908 (1), which affirmed a decision of the sheriff-substitute of Lanarkshire (A. T. Glegg) in an action for compensation arising under the Workmen's Compensation Act, 1906. The appellant was John George, a bottomer, and the respondents were the Glasgow Coal Company, carrying

(1) (1908) S. C. 846.

H. L. (Sc.) 1908

GEORGE v. GLASGOW COAL COMPANY, LIMITED.

on business at Kenmuichill Colliery, Carmyle, Scotland. The question was whether certain findings of fact come to by the sheriff-substitute as arbitrator acting under the Workmen's Compensation Act amounted to evidence which warranted his holding that the injuries sustained by the appellant were attributable to his "serious and wilful misconduct" so as to disentitle him to any compensation under the Act in respect of such injuries. The Ell coal seam bottom where the appellant worked was a mid-working situate forty feet above the main coal bottom, and was a working to which No. 3 of the additional special rules formed under the Coal Mines Regulation Acts, 1887 to 1896, applied. That rule provided, inter alia, that the bottomer "shall not open the gate fencing the shaft until the cage is stopped at such mid-working."

In the stated case asked for by the appellant the sheriff-substitute found that the following facts, inter alia, were proved: "John George, aged twenty-one, was a bottomer in the employment of the Glasgow Coal Company for some time prior to August 22, 1907, his average weekly earnings being 39*s*. George's working place was at the Ell coal seam bottom, which is a mid-working and is situated forty feet above the main coal bottom. His duties were to take off empty hutches from the cage and to put on full hutches. There is no light at the Ell coal except that supplied by miners' lamps. Where the Ell coal opens from the shaft there is no gate or fence which protects the opening automatically when the cage is not opposite the opening, but there is a gate which is opened and shut by the bottomer as required. According to the customary workings of the cage it stopped at the Ell coal without special signal when ascending empty from the main coal bottom, the engineman being able to tell from the pull on his engine when the cage was empty. It was restarted on its ascent from the Ell coal by a signal given from there. The bottomer at the Ell coal could also obtain the cage by signalling by bell when the cage was passing or had passed the Ell coal, when it was stopped and sent back to the Ell coal. If the bottomer at the Ell coal required a cage and it was not obtainable at the time in the way last mentioned, he called down the shaft to the main coal bottomer, who signalled

to the engineman to raise the cage, when it would be stopped at the Ell coal, either with or without a further signal as above described. The engineman, however, on receiving a signal from the main coal bottomer to raise the cage, was entitled, unless stopped by a further signal, to raise the cage to the pit head, and sometimes he did so, without stopping at the Ell coal. The cage in question was one of a pair which worked together, and there was no opening in the shaft on the opposite side corresponding to the Ell coal opening. On the occasion in question George called to the bottomer at the main coal to send up the cage, and the latter did so, George hearing the signal given for raising; the time required to raise the cage from the main to the Ell coal was a little over two minutes. George expected the cage would stop at the Ell coal level without any further signal being given, and acting on this assumption he, without ascertaining whether it had stopped, opened the gate, went some three yards along the level behind a full hutch, and pushed the hutch forward to the shaft. The cage had passed the Ell coal level without stopping, and George pushed the hutch into the shaft and fell with it to the bottom. He sustained a severe scalp wound and had his right tibia and fibular fractured. The Ell coal level is a working to which r. 3 of the additional special rules under the Coal Mines Regulation Acts, 1887 to 1896, applies. George previously opened the gate fencing the shaft when the cage had not stopped, and he had been warned about this a day or two prior to the accident. On these facts I found that George had not been seriously and permanently disabled in consequence of his accident, and that his injuries were attributable to his serious and wilful misconduct. I therefore assoilzied the defenders from the conclusions of the action and found them entitled to expenses. The amount of compensation to which the applicant would be entitled is 19*s.* 6*d.* per week from August 22, 1907. The question of law for the opinion of the Court is :—Is the applicant in view of the above findings barred from recovering compensation for his injury in respect that it is attributable to his serious and wilful misconduct? "

On May 27, 1908, the First Division, composed of Lords M'Laren, Kinnear, and Mackenzie, answered the question of law

H. L. (Sc.) 1908

GEORGE v. GLASGOW COAL COMPANY, LIMITED.

in the affirmative and affirmed the decision of the sheriff-substitute as arbitrator and dismissed the appellant's case. (1)

Nov. 9, 1908. *Scott Dickson*, *D.F.*, and *Atherley-Jones*, *K.C.* (with them *Moncrieff*) (the first and third of the Scottish Bar), for the appellant. Whether the concluding finding of the sheriff to the effect that the injuries of the appellant were attributable to his serious and wilful misconduct is a fair inference from the preceding findings is a question of law: see Lord Loreburn L.C. in *Johnson* v. *Marshall, Sons & Co., Ld.* (2) Lord Loreburn L.C. said in that case, "The word 'wilful' imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment. Further the Act says it must be serious, meaning not that the actual consequences were serious, but that the misconduct itself was so." The appellant objects to the judgment of Lord Kinnear that the seriousness of the misconduct is to be regulated by the nature of the accident which follows. (3) Here, whether tested by the word "serious" or by the word "wilful" as conditioning misconduct, the appellant's negligence in failing to verify whether his signal had been attended to was not conduct raising the statutory defence. In *Bist* v. *London and South Western Ry. Co.* (4) Lord Loreburn L.C. said: "Negligence will not suffice. I think the duty of the Court is to insist that there shall be sufficient proof, and to scrutinize that proof, bearing always in mind that negligence will not suffice."

Here the cage ought to have stopped at the Ell coal level, it being the usual practice, and the appellant expected it to stop; finding and expecting that, he opened the gate and fell in. There was no intention on his part in opening the gate before the cage stopped to break the rule. There were no means of giving distinct and sufficient signals, and the accident was directly due to the respondents' fault in not having established a system of articulate and unequivocal signals, as they were bound to do under the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49. The question of serious and wilful misconduct is a mixed question of law and fact: *Vaughan* v. *Nicoll.* (5) "It is not true to

(1) (1908) S. C. 846.
(2) [1906] A. C. 409, 411, 414.
(3) (1908) S. C. 846, 851.
(4) [1907] A. C. 209, 211.
(5) (1906) 8 F. 464, 467.

say that every breach of the rules under the Coal Mines Regulation Act, 1887, will necessarily amount to 'serious and wilful misconduct'": see Smith L.J. and Collins L.J. in *Rumboll* v. *Nunnery Colliery Co.* (1), cited with approval by Lord Atkinson in *Johnson* v. *Marshall, Sons & Co.* (2) The Scottish Courts have gone the length of saying that any breach of the coal mines regulation rules is "serious and wilful misconduct," which is equivalent to shifting the onus and putting it on the workman to prove that he has not wilfully broken the rules. But in *Rumboll* v. *Nunnery Colliery Co.* (1) it was said the circumstances under which the breach occurred must be ascertained and the whole matter considered, and that it was impossible for the Court to say that there was serious and wilful misconduct in every case of a breach of the rules. As against that decision see *United Collieries* v. *M'Ghie* (3), where the Court reversed the finding of the sheriff, that the man opened the gate through absentmindedness, and held the statutory defence proved on the ground that the man had a fixed duty prescribed by the rule "not to open the gate except when the cage was there." To hold that if a workman breaks a rule he has been guilty of serious and wilful misconduct, as the Court of Session have held here, is going too far. Wilful misconduct means conduct to which the will is a party: Bramwell L.J. in *Lewis* v. *Great Western Ry. Co.* (4); see also *Reg.* v. *Senior.* (5) The House must be satisfied that there was misconduct, and secondly that it was wilful. Finding 13 proves there was no wilful misconduct. The appellant opened the gate in the honest belief that the cage was there, and as nine times out of ten the cage did stop, the appellant submitted that the decision of the Court below was wrong, there not being sufficient evidence here to justify the finding that there was "serious and wilful misconduct." Wilfulness must be wilfulness in wrong-doing knowing the quality of the act; here the whole act was momentary, and a man acting inadvertently cannot be said to be guilty of wilful misconduct.

(1) (1899) 80 L. T. 42, 43.
(2) [1906] A. C. 409, 416.
(3) (1904) 6 F. 808, 810.
(4) (1877) 3 Q. B. D. 195, 206.
(5) [1899] 1 Q. B. 283.

H. L. (Sc.) 1908

GEORGE v. GLASGOW COAL COMPANY, LIMITED.

W. Hunter, K.C., and *J. Carmont* (both of the Scottish Bar), for the respondents, were not called upon.

LORD LOREBURN L.C. My Lords, the only question between the parties in this appeal was whether or not what the workman did or omitted to do amounted to serious and wilful misconduct. The only point for your Lordships is whether or not there was evidence on which any reasonable man could answer, as the sheriff here answered, the question in the affirmative. In my opinion there was such evidence, and, that being so, this appeal should be dismissed; for we cannot review the finding.

I desire to add but a very few words. In my opinion it is not the province of a Court to lay down that the breach of a rule is prima facie evidence of serious and wilful misconduct. That is a question purely of fact to be determined by the arbitrator as such. The arbitrator must decide for himself and ought not to be fettered by artificial presumptions of fact prescribed by a Court of law.

LORD ROBERTSON. My Lords, I concur. The scope of the present discussion is determined by the 14th section of the statute, and what we are in search of is a question of law. Unless a question of law be discovered we have no jurisdiction in the matter.

Now, my Lords, that consideration imposes, I think, a certain reserve on the tribunal of appeal in discussing what is really a matter of inference from evidence, and I do not propose to dogmatize or to express any definite opinion as to the materials which the arbitrator here had before him. I shall, as your Lordship has done, add merely one or two words which I think will be found to be in harmony with the authoritative decisions on this subject and which may help in the subsequent consideration or administration of this Act.

First of all, I entirely agree with what your Lordship has said, that the composite question whether there is anywhere serious and wilful misconduct cannot be determined by any cut and dry rules or even rules of presumption. I do not think, however, it is rash to say, in reference to the statutory rules, that we are here

considering in the first place the word "misconduct," and we have to dismiss from our minds altogether the prejudiced and inflamed meaning of the word "misconduct" which sometimes arises. The question here is not whether you could call it moral misconduct. You are dealing here with the conduct of a miner, and what you are in search of is misconduct on his part in regard to his business; and I do not think it is rash to say, if the rule tells him not to do something, that may be prima facie evidence of misconduct. It is a very different question whether it is serious and wilful misconduct. The determination whether those epithets are justified depends upon more complex considerations.

In the present instance, however, my Lords, I think there are one or two considerations which are completely sufficient to vindicate the arbitrator as having been within his province in deciding that this was serious and wilful misconduct. The first is this: This man not merely must be held to have known perfectly well the rule which categorically forbade him to do what he did do, but it had been brought home to his business and bosom, because in the twenty-first finding the arbitrator has found that a day or two prior to this very accident this man had been warned in consequence of previous transgressions in this very matter. Now, my Lords, after that, I must say I think it is very difficult to say that the arbitrator had no ground on which he could legally proceed in finding that there was wilful misconduct.

The other question, as to whether it was serious misconduct, seems to me again to derive very great help from the broadest facts of this case. It was in consequence of his breach of this rule that this man was pitched down this shaft, and a rule which is directed to prevent that occurrence seems to me to be in its nature, in its subject-matter, of a serious character, and, by consequence, a breach of it to be serious. Now, my Lords, in saying that I am not in the least traversing or going against what has been said in previous cases, because all that was said in previous cases about the relation of the word "serious" to the consequences is that you are not to judge by the event in that particular case whether it is serious or not. I supplement

H. L. (Sc.) 1908

GEORGE v. GLASGOW COAL COMPANY, LIMITED.

that by saying that you are to judge of the question of seriousness by reference to the subject-matter, if it touches life and limb.

LORD COLLINS. My Lords, I am entirely of the same opinion.

Ordered that the interlocutor of May 27, 1908, *appealed from be affirmed and the appeal dismissed with costs.*

Lords' Journals, November 9, 1908.

Agents for appellant: *Smiles & Co., for Simpson & Marwick, W.S., Edinburgh, and Hay, Cassels & Frame, Writers, Hamilton.*

Agents for respondents: *A. & W. Beveridge, for W. & J. Burness, W.S., Edinburgh, and W. T. Craig, Glasgow.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1908 *Nov.* 10.

CHARLES GORDON GILLESPIE . . . . APPELLANT;

AND

MISS L. M. RIDDELL . . . . . RESPONDENT.

Lease—Power of Heir of Entail in Possession to burden the Estate—Obligation to take over Sheep Stock on Expiration of Lease—Custom.

The appellant was tenant of a sheep farm forming part of an entailed estate in Scotland. The lease granted by the late heir of entail was for fifteen years from Whit Sunday, 1903, with an option to either party to terminate the lease at the end of the fifth year. The appellant at his entry upon the farm was required to take over the sheep stock from the outgoing tenant at a valuation, and the lease contained the following clause:—The tenant "shall deliver at the end of the lease to the landlord or incoming tenant as far as possible not more than the same number of sheep and the same classes as he receives on his entry and the proprietor agrees that the" tenant "or his representatives shall receive the same prices as he paid on his entry." The appellant paid to the outgoing tenant £1319 in 1903. In 1907 the late heir of entail in possession died and the respondent succeeded to the estate as next heir of entail. After her succession she repudiated the obligation to take over the sheep, and on the appellant not acquiescing she gave notice to terminate the lease on Whit Sunday, 1908. The appellant then raised

this action concluding for declarator that the obligation was binding on the respondent as heiress of entail. The respondent did not represent the grantor of the lease, nor was she liable for his debts:—

Held (affirming the decision of the First Division of the Court of Session), that the respondent was not liable under the obligation, as no heir of entail can be liable to pay a debt of a previous heir which has not been made a charge upon the estate itself and which is not authorized by the deed of entail.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellant was Charles G. Gillespie, tenant of the sheep farm of Ardery, forming part of the entailed estate of Sunart in the county of Argyll. The respondent was Miss Louisa Margarita Riddell, heiress of entail in possession of the entailed estate of Sunart. The question was whether an obligation in the lease of a sheep farm in Scotland was binding on the succeeding heir of entail. The lease in question was for fifteen years from 1903, with breaks in 1908 and 1913; it was granted by the late Sir Rodney Stuart Riddell, then heir of entail in possession of the estates of Sunart under an entail granted in 1852 with strict fetters of entail. In accordance with the practice in the Highlands of Scotland the appellant was at his entry to the farm of Ardery bound to take over the sheep stock from the outgoing tenant at a valuation, and the lease contained the following clause with regard to the stock:—"He" (the appellant and tenant) "shall deliver at the end of the lease to the landlord or incoming tenant as far as possible not more than the same number of sheep and the same classes as he receives on his entry and the proprietor agrees that the second party" (namely, the appellant and tenant) "or his representatives shall receive the same prices as he paid on his entry providing always that the landlord or incoming tenant shall not be bound to take over more ewes, ewe hoggs, or tups than the tenant took over at his entry."

The appellant took possession of the farm at Whit Sunday, 1903, and in accordance with the alleged invariable custom in such cases he paid for the sheep stock to the outgoing tenant 1319*l.* 1*s.* 11*d*

(1) (1908) S. C. 628.

H. L. (Sc.) 1908

GILLESPIE v. RIDDELL.

Sir Rodney Stuart Riddell died on January 2, 1907, and his sister, the respondent, succeeded to the entailed estates as next heir of entail. Shortly after her succession she caused intimation to be made to the appellant that she repudiated the obligation to take over the sheep stock, and on the appellant declining to acquiesce in the repudiation of the clause in his lease, she gave notice terminating the lease at the earliest available break, namely, Whit Sunday, 1908. The appellant then applied to the English trustees acting under the will left by the late Sir Rodney Stuart Riddell, but they as administrators of the personal estate of the deceased also repudiated all liability. In these circumstances the appellant raised this action concluding for declarator that the obligation in question was binding upon the respondent as heiress of entail in possession of the above-mentioned entailed estates. Since her succession the respondent had regularly claimed and received payment of the rents conditioned by the lease. In addition to bringing this action the appellant had also lodged in the administration suit in the Chancery Court, England, a claim against the estate of the late Sir Rodney Stuart Riddell for specific performance of the obligation in the lease, or otherwise for 2000*l.* as damages for breach thereof. On December 4, 1907, the Lord Ordinary (Lord Salvesen) allowed to the parties a proof of their respective averments, but on February 22, 1908, the First Division pronounced an interlocutor which recalled the Lord Ordinary's interlocutor and assoilzied the respondent from the obligation under the lease. (1)

July 23, 24. *James A. Clyde, K.C.*, and *A. H. B. Constable* (both of the Scottish Bar), for the appellant. The decision of the First Division was wrong. The appellant, according to the invariable custom in the north and west of Scotland, took over the sheep stock and paid the stipulated price for it. This stock could not be sold on the market at Whit Sunday except at a ruinous loss. There was nothing unusual in this clause, inasmuch as it was to the interest of an incoming tenant to have acclimatized stock, and if it is not enforceable, tenants in the

(1) (1908) S. C. 628.

position of the appellant will find themselves absolutely unable at the end of their leases to enforce their rights, and sheep farms will be practically unlettable. The respondent had enforced all the clauses of the lease. Power was given to the heir of entail to make leases, and such leases were enforceable against the next heir of entail. If so, why was not this clause as to paying for sheep stock enforceable? It was of the same character as other clauses of administration which have been held to be binding on succeeding heirs of entail. It was not a contravention of the deed of entail, as it was allowed by statute and was indispensable and in fact universal in all sheep farm leases. The Act of 1449, c. 18, made leases of lands effectual against singular successors of the landlord. The Act of 1685, c. 22, authorized the entail with clauses prohibiting alienation of the estate; contraction of debt affecting the estate; and the alteration of the succession to the estate. Then the Rosebery Act of 1836 (6 & 7 Will. 4, c. 42) authorized heirs of entail to grant leases of a certain duration. As regards the Act of 1449 a stipulation such as this, if granted by a fee simple proprietor, would, as conditions inter naturalia of the lease, be binding upon singular successors. It was at an early date established upon a fair construction of the statute of 1685 that leases of moderate duration could be regarded as ordinary acts of administration, customary and necessary for the reasonable enjoyment of the estate. Again, the Rosebery Act expressly provided that it should be lawful for heirs of entail in possession to grant tacks for any period not exceeding twenty-one years. A fair reading of the statute shews that it authorizes or exempts from the prohibitions of an entail all such stipulations or conditions as are usual and reasonably necessary to effectuate the purpose of the lease, the object being to relax the restrictions of entail law so as to enable leases to be granted for the proper administration of estates. An heir of entail is bound by acts done in the due administration of the estate, and this obligation is an act of administration and not a bare personal obligation, but a necessary condition of the lease, and therefore binding on the respondent.

[They commented on *Coutts* v. *The Tailors of Aberdeen* (1);

(1) (1840) 1 Rob. App. 296.

H. L. (Sc.) 1908 GILLESPIE v. RIDDELL.

Edmond v. *Reid* (1); *Dillon* v. *Campbell* (2); *Tod* v. *Moncreiff and Skene* (3); *Fraser* v. *Fraser* (4); *Mackenzie* v. *Mackenzie* (5); *Lord Herries* v. *Maxwell's Curator* (6); *Ross* v. *Duchess of Sutherland* (7); *Panton* v. *Mackintosh* (8); *Arbuthnot* v. *Colquhoun* (9); *Fraser* v. *Maitland.* (10)]

Scott Dickson, K.C., and the *Hon. W. Watson* (both of the Scottish Bar), for the respondent. There was a power in the heir of entail in possession to grant leases of ordinary duration in exchange for rent, but such heir had no power to charge the estate with debt, nor could he bind succeeding heirs in any obligation to pay money, for such a charge would be a contravention of the prohibition against burdening the estate. The obligation in question was a personal obligation. It could not be made a real burden on the entailed estates, there being no statutory relaxation of the fetters of the entail. The appellant is seeking to impose as a personal liability on the respondent an obligation contained in a deed granted by a former heir from whom the respondent took nothing, whom she did not represent. According to Scottish practice there are four essentials to a lease—parties, subject, duration, and rent; the clause as to taking over the sheep is quite a modern stipulation. But there are three conditional prohibitions against an heir of entail—(1.) he cannot alter the order of succession; (2.) he cannot alienate the estate; (3.) he cannot burden the estate with debt. The clause could only be enforceable if it fell within the exceptions to the prohibitions against creating a debt over the estate, which it did not. In fact the power claimed here was simply unenforceable against an heir of entail. It could not be enforced against the land. If the respondent had to pay this sum she would have to pay it out of her own personal resources. The clause in question was only a personal agreement and was not a convention which would run with the land. There was no custom established or

(1) (1871) 9 M. 782.
(2) (1780) Mor. Dict. 15, 432.
(3) (1823) 2 S. 1st ed. 113, 2nd ed. 104; affirmed (1825) 1 W. & S. 217.
(4) (1825) 4 S. 1st ed. 73, 2nd ed. 76; affirmed (1831) 5 W. & S. 69.
(5) (1849) 11 D. 596, 600.
(6) (1873) 11 M. 396, 398.
(7) (1838) 16 S. 1179.
(8) (1903) as a note to (1908) S. C. 647.
(9) (1772) Mor. Dict. 10, 424.
(10) (1824) 2 S. App. 37.

provided that the incoming tenant was bound to pay for the stock. It was always a matter of bargain and sale. The law will not allow anything to be charged against an entailed estate except by virtue of some statute. Neither does the clause relate to the management of the land; it is merely a provision as to dealing with the sheep at the end of the lease. The respondent could not be said to have adopted the lease; all she did was to repudiate the obligation and reserve her rights. The receipt of the rent was not in this case an adoption of the lease to the extent the appellant contends for.

[They cited *Earl of Galloway* v. *Duke of Bedford* (1); *Breadalbane* v. *Jamieson* (2); *The Queensberry Leases* (3); *Mackenzie* v. *Mackenzie* (4); *M'Gillivray's Executors* v. *Masson.* (5)]

James A. Clyde, K.C., in reply.

The House took time to consider their judgment.

1908. Nov. 10. Lord Loreburn L.C. My Lords, I have had the advantage of reading the opinion which my noble and learned friend Lord Robertson has written, and I entirely agree with it, as also do my noble and learned friends Lord Macnaghten and Lord Atkinson.

Lord Ashbourne. My Lords, I also entirely concur.

Lord Robertson. My Lords, I cannot profess to entertain any doubt of the soundness of this decision.

Each of the learned judges of the First Division has delivered a careful judgment, discussing the authorities which bear upon the subject and tracing those authorities to indisputable principles of entail law. So convincing have I found this exposition of the question, that I regard those three opinions as constituting a compendious account of this branch of the law which must hereafter be studied as of the highest authority.

This being so, I content myself with reminding your Lordships that the object of the present action was to compel the respondent

(1) (1902) 4 F. 851.
(2) (1877) 4 R. 667.
(3) (1819) 1 Bli. 339, 457, 502, 503.
(4) (1849) 11 D. 596.
(5) (1857) 19 D. 1099, 1106.

H. L. (Sc.) 1908 GILLESPIE v. RIDDELL. Lord Robertson.

to pay to a sheep farmer the price of his stock of sheep on a farm on his entailed estate. The respondent takes the estate not from the late heir of entail (who granted the lease out of which this claim arises), but from the maker of the entail (she being the person designated in the entail as the heir now entitled to take). The respondent does not represent the grantor of this lease and is not liable for his debts. She says that this money claim could not in any manner of way be made to affect the estate as a real burden without a manifest infringement of the conditions of the entail. She goes on to say that no heir of entail can be liable to pay a debt of a previous heir which could not be made to affect the estate itself. These propositions are supported by various authorities, cited by the learned judges, which apply to the present question, not by analogy or construction, but directly.

Your Lordships will remember that the facts of the present case point the application very clearly. Sir Rodney Riddell, the late heir, grants this lease of a sheep farm which stipulates for a fixed annual rent, and then engages that the sheep shall be taken over at the end of the lease at the same prices as were paid at the commencement of the lease. Curiously enough, the exigencies of argument make it necessary for the present appellant to suggest that without a stipulation like this about taking over the sheep the tenant would not have agreed to pay so high a rent. Now to the respondent the practical effect is that while Sir Rodney got the enhanced rent she has got to pay the inducing premium. The plain English of this is that the estate is to be of less capital value to the respondent by this sum. I find it impossible to regard this as anything else than a burdening or alienation, and as a flat contravention of the entail.

The process of reasoning by which the Lord Ordinary justified the claim of the appellant was in its essence very simple. He says, if the appellant's averments are true (and this was the condition of the argument), such stipulations are quite usual in leases of sheep farms. He goes on to say that there is authority for holding that acts of ordinary administration are binding on subsequent heirs, the conclusion being that as this is (said to be) an act of ordinary administration it is binding.

The essential flaw in this argument is in assuming the word "ordinary" to regularize for heirs of entail what is of common occurrence among estates generally. Now no act of administration has ever been held binding on a succeeding heir which did not stand the test of complying in its nature and consequences with the conditions of the entail.

This is the peremptory requirement consistently adhered to in the decisions of your Lordships' House and of the Court of Session. And while it may safely enough be affirmed that acts of the heir in possession must be of ordinary administration in relation to the interests of the estate as in the hands of a fee simple proprietor, they must also square with and not infringe the rights of those third parties whose interests are safeguarded by the conditions of the entail.

I shall only add that, once it is remembered what was the tenure of Sir Rodney, as an entailed proprietor, and what the rights of this respondent, as in no way liable for his debts or taking estate from him, the result is not only logical but just.

LORD COLLINS. My Lords, I agree.

Ordered that the interlocutor of the First Division of the Court of Session dated February 22, 1908, *in part appealed from be affirmed and the appeal dismissed with costs.*

Lords' Journals, November 10, 1908.

Agent for appellant: *John Kennedy, W.S., for Macrae, Flett & Rennie, W.S., Edinburgh.*

Agents for respondent: *A. & W. Beveridge, for Hamilton, Kinnear & Beatson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H L. (Sc.) 1908 Nov. 11

CALEDONIAN RAILWAY COMPANY . . . APPELLANTS;

AND

CORPORATION OF CITY OF GLASGOW (ET E CONTRA) . . . . . RESPONDENTS.

Railway—Bridge carrying Public Highway over Railway—Liability to maintain Road—Glasgow Police Act, 1866 (29 & 30 *Vict. c. cclxxiii.*), *ss.* 310, 316—*City of Glasgow Act*, 1891 (54 & 55 *Vict. c. cxxx.*), *s.* 35—*Railways Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 33), *s.* 39—*Caledonian Railway (Additional Powers) Act*, 1872 (35 & 36 *Vict. c. cxiv.*), *ss.* 4, 26.

By s. 39 of the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), "If the line of the railway cross any turnpike road or public highway . . . . either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge . . . . and such bridge with the immediate approaches and all other necessary works connected therewith shall be executed and at all times thereafter maintained at the expense of the company." In 1898 two streets, B. and C., previously forming part of the county district, were with other areas included within the boundaries of the city of Glasgow. A third street, S., was declared a public street in 1894. Prior to 1899 parts of these streets were carried over railways belonging to the appellants by means of bridges which were constructed by the appellants. The city of Glasgow claimed that the roadways of these three streets over the bridges and the approaches thereto fell to be maintained and repaired by the appellants. B. and C. had been respectively a statute labour road and a turnpike road, and S. had been a private occupation road. The appellants contended that the section only applied to county roads and not to streets in a town:—

Held (affirming the decision of the First Division of the Court of Session), that B. and C. were public highways, and therefore the appellants were bound to maintain the roadways where they crossed their railway, and the approaches to the bridges; but that as to S., it being proved that it was a private street when the appellants' railway bridge was constructed, the appellants were not bound to maintain the roadway

APPEAL and cross-appeal from the First Division of the Court of Session, Scotland. (1) This was an action for declarator at the instance of the corporation of Glasgow, the respondents in the appeal against the Caledonian Railway Company, the

(1) (1906) 8 F. 755; (1908) S. C. 244.

appellants in the appeal and respondents in the cross-appeal, to have it declared that the Caledonian Railway Company were bound to maintain portions of certain public streets in Glasgow which were carried over the appellants' railway by means of bridges. The streets were Broomfield Road, Cumbernauld Road, and Strathclyde Street, Glasgow. The Lord Ordinary (Lord Low) on March 17, 1905, sustained the action in regard to Broomfield Road and Cumbernauld Road, and that decision was upheld by the First Division by interlocutor dated March 20, 1906 (1), against which the appellants the Caledonian Railway Company brought this appeal. As regards Strathclyde Street the Lord Ordinary (Lord Salvesen) decided, October 23, 1906, in favour of the Caledonian Railway Company, holding that they were not bound to maintain and repair it, and on appeal the First Division affirmed, November 29, 1907 (2), the Lord Ordinary's judgment. Against this finding the corporation of the city of Glasgow brought the cross-appeal.

The appellants' railway, under certain special Acts of the years 1847, 1872, 1878, and 1882, crossed the line of Broomfield Road (originally a statute labour road) and Cumbernauld Road (originally a turnpike road) at various points, and at each point the streets are respectively carried over the railway by a bridge, namely, five bridges at Broomfield Road, and one bridge at Cumbernauld Road. Prior to August 1, 1899, Broomfield Road and Cumbernauld Road were under the jurisdiction of the district committee of the district of the lower ward of Lanarkshire, but on the passing of the Glasgow Corporation (Tramways, Libraries, &c.) Act, 1899, these roads formed part of the area included by that Act within the boundaries of the city of Glasgow. The corporation contended that under s. 39 (3)

(1) 8 F. 755.

(2) (1908) S. C. 244.

(3) By s. 39 of the Railways Clauses Consolidation (Scotland) Act, 1845, "If the line of the railway cross any turnpike road or public highway, then, except where otherwise provided by the special Act, either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width, and with the ascent or descent by this or the special Act in that behalf provided; and such a bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at

H. L. (Sc.) 1908

CALEDONIAN RAILWAY v. GLASGOW CORPORATION.

of the Railways Clauses Consolidation (Scotland) Act, 1845, the appellants were bound to maintain the portions of Broomfield Road and Cumbernauld Road carried over the appellants' railway and bridges, including the immediate approaches to these bridges, whereas the appellants maintained that the obligation of maintenance under s. 39 did not apply to streets which were administered under burgh police statutes or under special police powers, such as those conferred by local private Acts of Parliament on the corporation of Glasgow. The appellants contended that where a highway falls under municipal administration it is not merely transferred to a new administration, but its whole character is changed; it ceased to be a mere throughgoing way from one place to another and became a public place of frequent resort and subject to other uses in a populous centre; instead of being maintained merely as a means of communication from place to place, a burgh street was administered with a view to the police regulations and upkeep appropriate to a public place in a city devoted to municipal purposes. The burden of maintaining a street carrying heavy traffic, with foot pavements constructed in accordance with municipal requirements, was much beyond what was imposed on a railway company with respect to a public highway in the county. The appellants further contended that the duty of maintenance generally was imposed on the corporation by s. 310 of the Glasgow Police Act, 1866 (1), and that the future maintenance

---

all times thereafter maintained at the expense of the company; provided always that, with consent of the sheriff or two or more justices, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level." See s. 46 in the English Act (8 Vict. c. 20).

(1) By s. 310 of the Glasgow Police Act, 1866 (29 & 30 Vict. c. cclxxiii.), "Subject to the obligations hereinafter imposed on the proprietors of lands and heritages, the Board" (magistrates and council) "shall make provision for maintaining, and so far as thought expedient for causewaying the public streets in a suitable manner, and for altering, repairing, and renewing the said causeway."

By s. 316, "On completion of said causeway and its approval by the master of works, or by the magistrate or Dean of Guild . . . . the registrar shall make an entry thereof in the register of public streets, which shall ipso facto relieve the proprietor from liability for the future maintenance or renewal of the said causeway."

of causewayed public streets was by s. 316 directly imposed on the city to the relief of those formerly liable. Over Cumbernauld Street the respondents had constructed tramways, and they admitted their obligation to maintain the road between the rails and the portion of road between the tramway and so much of the road as extended eighteen inches beyond the rails on either side.

As to Strathclyde Street, this street was carried over the appellants' railway by means of two bridges; its history was given, inter alia, as follows by Lord Salvesen: "Prior to 1854 a carriage road existed substantially on the line of Strathclyde Street as it now exists. It led from Dalmarnock Road to a street which is now called Swanston Street, which also communicated with another part of Dalmarnock Road. Both roads were entirely on the private property of the Dalmarnock trustees. At that time Swanston Street was known as 'the coal road,' having been originally formed in order to give access to a coalpit then being

---

By s. 3 of the City of Glasgow Act, 1891 (54 & 55 Vict. c. cxxx.), "powers" "includes rights, jurisdictions, capacities, privileges, and immunities."

By s. 27, "Subject to the provisions of this Act, and excepting as aftermentioned, the lands, buildings, sewers, lamps, lamp-posts, pipes, mains, plant, and all other property, assets, and powers of every description vested in, held by, or due or belonging to any councils, commissioners, or authorities within the district added, shall from and after the commencement of this Act be by virtue of this Act transferred to and vested in, be held by and be due and belong to the corporation, the police commissioners, or the parks and galleries trustees, or other transferees, as such property and assets would, if within the existing burgh, belong to or be comprised within the administration of any one of those authorities, and shall form part of the property and assets of the city for all the estate and interest therein of such councils, commissioners, or authorities, and shall be held, received, and enjoyed by the respective transferees accordingly, and the powers, duties, and liabilities of such councils, commissioners, or authorities shall be transferred and attach to the respective transferees, and shall form part of the powers, rights, debts, liabilities, and obligations of the city, and be enjoyed, exercised, paid, discharged, and performed by the respective transferees."

By s. 35, sub-s. 1, "All public roads, highways, streets, footpaths, lanes, and courts in the district added, where vested in the several county councils, district committees, councils, commissioners, or authorities within the district added, or any of them, shall be and are hereby transferred to and vested in the police commissioners, and the same shall be subject to the provisions of the Police Acts."

H. L. (Sc.) 1908

CALEDONIAN RAILWAY v. GLASGOW CORPORATION.

worked on the Dalmarnock estate. There was a line of rails on the road, used by the hutchers, which conveyed the coal from the pit. Opposite Guthrie's farm there was a gate which went right across the road and which was always closed on Sundays, but was open the rest of the week. There seems also to have been a gate at the other end. Strathclyde Street was then known as 'the field road' and apparently passed through agricultural land. It may originally have been a farm road, although its origin has not been ascertained in this process. In the earliest ordnance survey it is described as an occupation road; and in 1858, when the defenders obtained their first Act of Parliament to construct a railway across it, it is again so described in the book of reference. . . . . I cannot doubt therefore that prior to 1858 Strathclyde Street was a private road belonging to the proprietors of Dalmarnock estate. It is also in favour of this contention that the original railway crossed what is now Strathclyde Street on the level, although this, of course, is by no means conclusive. In 1854, however, the owners of Dalmarnock estate commenced to feu the ground fronting Strathclyde Street. The earliest feu contract was one in favour of Muir, Brown & Co., who took a feu of six acres for the erection of a factory. . . . . It appears from the same feu contract that the road was at that time only fifteen feet wide. . . . . The next feu that was given off was one in April, 1863, and the northern boundary of this feu is 'the centre of a proposed street of fifty feet in breadth.' Access is given to the ground 'by the road presently in use, leading in both directions from the conclusion of Hamilton turnpike road to or near the ground hereby disposed. . . . . In 1865, 1868, and 1870 further feus were granted, in the last of which the boundary is given as 'the centre line of street to be formed, fifty feet in breadth from building line to building line.' From the parol evidence it appears that by 1872 all these feus had been covered with buildings used for manufacturing purposes. . . . . In 1870 the road was taken over under the Glasgow Police Act of 1866 as a private street; and the usual assessment notices were from that time onwards issued to the proprietors on both sides. It then became subject to the jurisdiction

of the magistrates of Glasgow for the purposes of the Act of 1866 so far as that Act applies to private streets, and for all practical purposes this was a highway used by the public, just like any of the other streets in the city of Glasgow. Further it may be conceded that it was very unlikely indeed that it would ever be closed to public traffic, in view of the desire of the proprietors to promote more extensive feuing . . . ."

The appellants in 1872 obtained powers to widen the existing Dalmarnock branch railway. The latter branch railway originally crossed on the level. In constructing the railway authorized by the Act of 1872 the appellants diverted the road and discontinued the level crossing and carried the diversion of the road as then widened to forty feet over the Dalmarnock branch and the railway authorized by the Act of 1872 by means of a bridge. In order to form the diversion of the road the Caledonian Railway Company acquired the ground forming the solum of the diversion. Then by the Glasgow Central Railway Act of 1888 the Caledonian Railway Company constructed another railway in and across Strathclyde Street, alongside the railway authorized by the Act of 1872. In constructing this railway the Caledonian Railway Company lengthened the bridge, carrying Strathclyde Street over their Dalmarnock branch railway, but they did not alter the line or level of the said street. In 1894 an application was made to the Dean of Guild Court to declare the said street a public street, and by interlocutor dated April 19, 1894, the Dean of Guild declared the said street to be a public street subject to the provisions of the Glasgow Police Act, 1866.

As to this street the Caledonian Railway successfully contended in the Court below—it being their alternative contention—that they were not bound to maintain the roadway or approaches to the bridge carrying Strathclyde Street over their railway, in respect that at the time the bridge was constructed by them it was not a "public highway" in terms of s. 39 of the Railways Clauses Consolidation Act, 1845. It was, on the other hand, maintained by the corporation that by s. 26 of the Caledonian Railway Company's Act of 1872 (35 & 36 Vict. c. cxiv.) (1) the

(1) By s. 26 of the Caledonian Railway (Additional Powers) Act, 1872, it was provided: "In constructing railway No. 2 the following

H. L. (Sc.) 1908

CALEDONIAN RAILWAY v. GLASGOW CORPORATION.

Caledonian Railway Company were bound, if they exercised the powers given to them by that clause and diverted the road and carried it by a bridge over the railway, to maintain the diverted road in the future.

1908. July 20, 21. *James A. Clyde, K.C.*, and *A. Orr Deas* (both of the Scottish Bar), for the appellants. The decision of the Court of Session as regards Broomfield and Cumbernauld Roads was wrong. The expression in s. 39 of the Railways Clauses Consolidation (Scotland) Act, 1845, "any turnpike road or public highway," must be held to refer only to highways ejusdem generis with turnpike roads; and the section did not apply to "streets" in a burgh.

As to Strathclyde Street, it was a private accommodation road for the use of the feuars on the Dalmarnock estate and access to a coalpit. At the date when the bridge over the railway was made (1872) the public had not acquired any legal rights in respect to it; therefore it was not a public highway within the above-mentioned section of the Act of 1845. Moreover, in 1872 the owners of the adjoining properties could have closed it to the public; and in s. 26 of the railway company's Act of 1872 there is nothing about maintenance.

William Campbell, D.F., and *M. P. Fraser* (with them *Crawford*) (all of the Scottish Bar), for the respondents. There was here an obligation on the railway company to make and maintain Strathclyde Street over their railway. The words "public highway" included a road which the public used as a matter of right, and in 1872 this road was in constant and daily use by the public. Again, this road was under the control of the public authority as to lighting and cleaning, and when such is the case in Scotland the road is a public street; such control was inconsistent with any other view. Further, the railway

provisions shall be binding on the company, who shall construct the works hereinafter specified in manner hereinafter directed. . . . .

"(3.) The road or thoroughfare numbered on the deposited plans 4 in the parish of Calton, may be diverted as shewn on those plans, and shall be carried over the railway by a bridge not less than forty feet wide between the parapets, and the diverted portion of road shall not be less than forty feet wide between the fences."

company were bound to repair under their Act of 1872, s. 26, sub-s. 3. When Parliament requires that a road shall be carried by a bridge, it makes that requirement in the interest of the public, and therefore the appellants were bound, if they constructed their line and bridge, to maintain the road. In short, the obligation to maintain the structure of the bridges carried with it the obligation to maintain the roadway upon these bridges. [They referred to *North Staffordshire Ry. Co.* v. *Dale* (1); *Lancashire and Yorkshire Ry. Co.* v. *Mayor of Bury* (2); *Reg.* v. *Great Western Ry. Co.* (3); *Kinning Park Police Commissioners* v. *Thomson & Co.* (4); *King* v. *Kerrison* (5); *King* v. *Inhabitants of Lindsey.* (6)]

James A. Clyde, K.C., in reply, cited *West Lancashire Rural Council* v. *Lancashire and Yorkshire Ry. Co.* (7)

William Campbell, D.F., in reply in the cross-appeal.

The House took time for consideration.

1908. Nov. 11. LORD LOREBURN L.C. My Lords, I think it is quite clear that both the appeal and cross-appeal should be dismissed. Two of the roads in question, Broomfield Road and Cumbernauld Road, are public highways, and to them s. 39 of the Railways Clauses Consolidation (Scotland) Act, 1845, applies. Accordingly the railway company must maintain them. I can see no force in the argument that because certain sections of other Acts impose duties of maintenance or confer rights of interposition on other persons which may have become operative when those roads were taken within the city boundaries, therefore the 39th section ceases to have its full effect. Mr. Clyde did not argue that this section was repealed, but that it was "superseded," and only as to a part thereof. No doubt circumspect language is necessary in advancing such a contention, but I do not know what supersession means if it falls short of repeal.

In regard to Strathclyde Street the First Division decided in favour of the railway company. I agree that s. 39 does not apply to this street, because when the bridge was erected it was not a

(1) (1858) 8 E. & B. 836.
(2) (1889) 14 App. Cas. 417.
(3) (1893) 62 L. J. (Q.B.) 572.
(4) (1877) 4 R. 528.
(5) (1815) 3 M. & S. 526.
(6) (1811) 14 East, 317.
(7) [1903] 2 K. B. 394.

H. L. (Sc.) 1908

CALEDONIAN RAILWAY v. GLASGOW CORPORATION.

Lord Loreburn L.C.

public highway, as explained by the Lord President. The liability to repair, if it exists, must be found in the Caledonian Railway Act, 1872. Taking ss. 4 and 26 of that Act together with ss. 46 and 49 of the Railways Clauses Consolidation (Scotland) Act, 1845, I think the result is as follows. If the Caledonian Railway Company exercised the powers given by the Act of 1872 they were to divert the old road and carry over the railway by a bridge another substituted road. They are not required to maintain the roadway of the substituted road, but they are required to carry it over the line by a bridge, and must therefore maintain the bridge and approaches.

It is impossible to suppose that, being authorized to destroy an old road and directed to carry a new substituted road over their line, they are at liberty afterwards to remove the support and so leave no road at all. But that is quite different from maintaining the roadway itself. The duty of doing that was on others before the diversion, and the Acts do not relieve those others from it. I should have so decided even without assistance from the authorities cited by the Dean of Faculty. I hesitate to add that s. 7 of the Caledonian Railway Act, 1872, applies to the repair of the roadway, for that section was not relied upon, or faintly relied upon, in argument. So I do not rest my opinion on that ground, though it seems at least arguable. I think the conclusion fairly follows from a consideration of the other sections to which I have referred.

LORD ASHBOURNE. My Lords, I agree.

LORD ROBERTSON. My Lords, I concur.

Ordered that the interlocutors in part complained of in the appeal and cross-appeal be affirmed and the appeal and cross-appeal dismissed with costs.

Lords' Journals, November 11, 1908.

Agents for appellants: *Grahames, Currey & Spens, for Hope, Todd & Kirk, W.S., Edinburgh, and H. B. Neave, Glasgow.*

Agents for respondents: *Martin & Co., for Campbell & Smith, S.S.C., Edinburgh, and A. W. Miles, Glasgow.*

[HOUSE OF LORDS.]

NAIRN AND OTHERS . . . . . APPELLANTS;

AND

UNIVERSITY OF ST. ANDREWS AND OTHERS RESPONDENTS.

H. L. (Sc.)
1908
Dec. 10.

Parliament—Franchise—Right of Women Graduates to Vote—Representation of the People (Scotland) Act, 1868 (31 & 32 *Vict. c.* 48), *ss.* 27, 28—*Universities Elections Amendment (Scotland) Act*, 1881 (44 & 45 *Vict. c.* 40), *s.* 2, *sub-ss.* 3, 10, 16—*Universities (Scotland) Act*, 1889 (52 & 53 *Vict. c.* 55), *s.* 14, *sub-s.* 6.

By s. 27 of the Representation of the People (Scotland) Act, 1868, "Every person whose name is for the time being on the register . . . . of the general council of such university, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university in terms of this Act"; and by s. 28, sub-s. 2, the following persons shall be members of the general council of the respective universities: "All persons on whom the university to which such general council belongs has after examination conferred" certain degrees, "or any other degree that may hereafter be instituted." The appellants were five women graduates of the University of Edinburgh, and as such had their names enrolled on the general council of that university, and they claimed as graduates and members of the general council the right to vote at the election of a member of Parliament for the university:—

Held (affirming the decision of the Extra Division of the Court of Session), that the appellants were not entitled to vote in the election of the parliamentary representative of the university.

There is no evidence of any ancient custom for women to vote in parliamentary elections.

APPEAL from the Extra Division of the Court of Session, Scotland. (1) The appellants were Miss Margaret Nairn, M.A., Edinburgh, Miss Frances Helen Simson, M.A., Edinburgh, Miss Jessie Chrystal Macmillan, B.Sc., Miss Frances Helen Melville, M.A., and Miss Elsie Inglis, M.B., C.M. The respondents were the university courts of St. Andrews and Edinburgh, and the chancellors, vice-chancellors, and registrars of the universities. The appellants were graduates of the University of Edinburgh, and as such have their names enrolled on the general council of that university, and this

(1) (1908) S. C. 113.

H. L. (Sc.) 1908

NAIRN v. UNIVERSITY OF ST. ANDREWS.

action was brought by them in 1906 claiming a right as graduates and members of the general council to vote in the election of the parliamentary representative of the University of Edinburgh. The four Universities of Scotland among them return two members of Parliament, one being elected by and representing the Universities of St. Andrews and Edinburgh and the other being elected by and representing the Universities of Glasgow and Aberdeen. The Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. c. 48), first created the university franchise in Scotland, and by s. 27 of that Act "every person whose name is for the time being on the register, made up in terms of the provision as hereinafter set forth of the general council of such university, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university in terms of this Act." By s. 28 "under the conditions as to registration hereinafter mentioned the following persons shall be members of general council of the respective universities, viz.—(1.) All persons qualified under the 6th and 7th sections of the Act 21 & 22 Vict. c. 83; (2.) All persons on whom the university to which such general council belongs, has, after examination, conferred the degree of doctor of medicine, or doctor of science, or bachelor of divinity, or bachelor of laws, or bachelor of medicine or bachelor of science, or any other degree that may hereafter be instituted." The machinery for carrying the election of a member for the universities into effect was provided by the Universities Elections Amendment (Scotland) Act, 1881 (44 & 45 Vict. c. 40), which was entitled "An Act to make farther provision in regard to the registration of parliamentary voters and also in regard to the taking of the poll by means of voting papers in the universities of Scotland." By s. 2, sub-s. 3, "In case of a poll the registrar of the university . . . . shall issue simultaneously through the post a voting paper . . . . to each voter to his address as entered on the register of the general council of the university, who shall appear from said address to be resident within the United Kingdom or the Channel Islands." By s. 2, sub-s. 10, "It shall be lawful for any candidate or the agents of the candidates

who may be in attendance to inspect any voting paper before the same shall be counted and to object to it on one or more of the following grounds; . . . . (2.) that the person giving a vote by the voting paper is not qualified to vote . . . . and the vice-chancellor or one of his pro-vice-chancellors shall have power to reject or receive, or receive and record as objected to, any voting papers." By s. 2, sub-s. 16, "No person shall be allowed after examination to graduate at any of the universities of Scotland until he shall have paid" a registration fee, "and thereafter the name, designation, qualification and ordinary place of residence of each person qualified as at present to become a member of the general council of his university shall on his graduation be entered" on the register of members of the general council: "Provided always that no person subject to any legal incapacity shall be entitled to vote at any parliamentary election or exercise any other privilege as a member of the general council of any university." At the date of the above Acts, 1868 and 1881, women were not admitted to graduation in any of the Scottish universities, but they were attending university classes. That they were not entitled to become graduates was decided by seven judges to five in *Jex-Blake* v. *Senatus of the University of Edinburgh.* (1) In 1889 the Universities (Scotland) Act (52 & 53 Vict. c. 55) was passed, appointing commissioners to regulate various matters of university administration. It gave power (s. 14) to the commissioners to make ordinances for inter alia the following purpose, sub-s. 6, "to enable each university to admit women to graduation in one or more faculties and to provide for their instruction." In 1892 the commissioners made the following ordinance (Ordinance 18): "It shall be in the power of the university court of each university to admit women to graduation in such faculty or faculties as the court may think fit." Since that ordinance women have graduated in a variety of faculties in the Scottish universities, and have paid the registration fee to the general council, and have been duly entered on the register of members of the general council and have exercised all privileges of members of the council except the right of voting in

(1) (1873) 11 M. 784.

H. L. (Sc.) 1908 NAIRN v. UNIVERSITY OF ST. ANDREWS.

a parliamentary election. There was no contest for the joint representation of St. Andrews and Edinburgh until 1906, when the appellants applied to the registrar of the University of Edinburgh that, being on the register of the general council, they were entitled under s. 2, sub-s. 3, of the Act of 1881 to have voting papers sent to them, but the registrar refused to issue voting papers to the appellants or to any women whose names were on the register. In these circumstances the appellants brought this action against the university courts of the two Universities of St. Andrews and Edinburgh, and the chancellors, vice-chancellors, and registrars of the universities, to have it declared that: (1.) Prior to December 31, 1905, and at the date of the demand for a poll at the election of a member of Parliament for the Universities of St. Andrews and Edinburgh, the pursuers were, and have since been and now are, on the register of the general council of the University of Edinburgh; (2.) that while and so long as the appellants are on the said register they are entitled at the present and on the occasion of any and every future parliamentary election for the said universities (*a*) to receive voting papers from the registrar, (*b*) to vote by duly marking the same, and (*c*) to have their votes so given duly counted.

The Lord Ordinary (Lord Salvesen) on July 5, 1906, held that the appellants, being women, were not entitled to receive voting papers and were not entitled to vote at the election of a member of Parliament, and the Lord Ordinary's decision was affirmed by the Extra Division of the Court of Session on November 16, 1907. (1)

Nov. 10, 12, 1908. *Miss Macmillan* and *Miss Simson* (assisted by *John Mair*, of the Scottish Bar), for the appellants. There is a precedent for a woman and also for two appellants addressing the House to plead their own case in the case of *Shedden* v. *Patrick*. (2) With regard to the question before the House, the franchise for the universities of Scotland is different from any other parliamentary franchise, and different from the English university franchise. Other franchises have some

(1) (1908) S. C. 113. (2) (1869) L. R. 1 Sc. & D. 470.

connection with property and with the principle that taxation involves representation. But this franchise is quite distinct—an intellectual test is required. The registrar, in rejecting the appellants' voting papers, acted in contravention of the statutory duty imposed upon him by s. 2, sub-s. 3, of the Act of 1881 to give them voting papers, and there can be no answer in law to their claim. The refusal to give them voting papers has prevented them from bringing their appeal before the vice-chancellor's court, which was the statutory tribunal where the question should have been decided. But the main question is, Have women graduates a right to vote in the election of a member of Parliament for the universities? The appellants were admittedly on the register and they were of full age, so the question was, Were they "persons," and were they "not subject to any legal incapacity"? They maintain that they are "persons" within the meaning of s. 27 of the Act of 1868. The word "persons" in its ordinary signification includes both men and women. A different word would have been used if the franchise was to be conferred only on male graduates. Besides this, s. 27 contains an interpretation clause, namely, "Every person . . . . on the register made up in terms of the provisions hereinafter set forth," i.e., as defined below. The provisions are set forth in s. 28, and the expression "all persons" in s. 28 has always been applied to women and is admitted by the respondents to be rightly applied to them. The word "person" under construction is here expressly defined. In the other enabling sections of this Act the word "man" is used. Sects. 3, 4, 5, and 6, which deal with county and burgh franchise, and which conferred new franchises, use the term "man." It cannot be assumed that the change involves no change of meaning—*Guardians of Brighton* v. *Guardians of Strand Union* (1)—without a purpose; and the same restriction is imposed on the "man," which, secondly, is imposed on the "person," namely, the restriction "not subject to any legal incapacity." *Chorlton* v. *Lings* (2) was relied on by the respondents. In that case Bovill C.J. said: "The conclusion at which I have arrived is that the legislature used the word 'man' in the Act of 1867

(1) [1891] 2 Q. B. 156, 167. (2) (1868) L. R. 4 C. P. 374, 387.

H. L. (Sc.) 1908 — NAIRN v. UNIVERSITY OF ST. ANDREWS.

[30 & 31 Vict. c. 102] in the same sense as 'male person' in the former Act; that this word was intentionally used, in order to designate expressly the male sex." In the School Board (Scotland) Act of 1872 (35 & 36 Vict. c. 62) the same words are used (Sched. B, sub-s. 2) in conferring the franchise on those who are to vote for members of school boards as are used in conferring the franchise on the universities, and women have always voted for members of school boards. In *Ramsay* v. *Craig* (1) Lord Fraser, then sheriff, decided that a woman, even if married, was a "person" within the meaning of that Act. The Municipal Corporations Act of 1835 (5 & 6 Will. 4, c. 76), s. 9, gave the franchise to "male persons," and in the amending Act of 1869 (32 & 33 Vict. c. 55), s. 1, the word "male" was dropped out, and that was taken to mean that women thereby acquired the right to vote. In the Electional Code of New Zealand, 1893, the expression "persons not subject to legal incapacity" is used, and women have always voted for members of Parliament in New Zealand. So also in the Franchise Act of the Isle of Man (Act 1881 S. 5, vol. 5 of Statutes of I. O. M. 95) women have the right to vote there. Then in the Act of 1881 itself (44 & 45 Vict. c. 40) the word "person" is used in certain sections which admittedly apply to women. The proviso to s. 2, sub-s. 16, was: "Provided always that no person subject to any legal incapacity shall be entitled to vote at any parliamentary election or exercise any other privilege as a member of the general council of any university." All parts of the section had been applied to the appellants; they were not allowed to graduate until they paid the registration fee, and they had exercised all privileges as members of the general council except voting: see also s. 28 of the Act of 1868, which defines the word "person." In *Reg.* v. *Crosthwaite* (2) the words were "Every person of full age who shall have occupied as tenant or owner," &c. (17 & 18 Vict. c. 103, s. 22); and it was held that women under those words could vote at the election of town commissioners. Four judges agreed there that the word "person" where voting rights were conferred included women. There was an appeal from the decision (3)

(1) 20 Jour. of Jurisprudence, 483. (2) (1864) 17 Ir. C. L. R. 157, 162.
(3) 17 Ir. C. L. R. 463, 471-477, 480.

and it was reversed by four judges against three, but it was reversed on the special grounds that the word "person" depended for its meaning on another section of the Act in which male persons were referred to. There Christian J., who gave the casting vote, said he was not ashamed to say he had changed his opinion more than once during the argument. In that case out of the total of eleven judges seven were in favour of the right of women to vote and four against it. No statute, nor decision, has been cited in the Court below in which "person" has been construed to refer to males alone. Therefore the appellants submit that they are "persons" within the meaning of s. 27 of the Act of 1868.

Further, the appellants are "not subject to any legal incapacity." To define this expression, however, there is no interpretation clause, so it must be interpreted by its use in other Acts. Now in every other Act in which the expression is used it does not refer to women. In the Act of Union, 1707 (6 Anne, c. 6), s. 5, the words "legal incapacity" cannot refer to incapacity of sex, for a member of Parliament is not liable to a change of sex. In the Reform Act of 1832 (2 Will. 4, c. 45), s. 19, the suffrage was conferred on "every male person not subject to any legal incapacity." As the words "male person" are used there it was not possible the incapacity could have any reference to sex. In the School Board Act the same expression occurs, but women have always voted; and accordingly in the Act of 1881, s. 2, sub-s. 16, "legal incapacity" does not refer to women; under that proviso women have exercised all the privileges of members of the general council. It is true that *Chorlton* v. *Lings* (1) decided that women were subject to a legal incapacity from being registered as parliamentary voters, but that decision was fallacious and besides does not apply. Legal incapacity applies generally to men or women. It cannot have any reference to sex. The respondents contend that by the constitutional or common law of the land women are in respect of their sex incapacitated from voting, but the common law does not apply to a new franchise. There was no graduate franchise before 1868, and the common law excludes male and female graduates alike. Besides, legal incapacity at common law is a contradiction in sense. It

(1) L. R. 4 C. P. 374.

H. L. (Sc.) 1908 NAIRN v. UNIVERSITY OF ST. ANDREWS.

assumes the taking away of a right that exists, whereas if the right exists, since there is no negative prescription, common law cannot take it away. There are two decisions favourable to women's rights to vote. *Olive* v. *Ingram*(1) decided that a woman may vote at the election for a sexton. There Lee C.J.(2) said: In the case of *Holt* v. *Lyle*, 4 Jac. 1, it is determined that "a feme sole freeholder may claim a voice for Parliament men. But if married, her husband must vote for her." By that decision it seems as if there had been no disability. In the same case Page J. said (3): "I see no disability in a woman from voting for a Parliament man." The case of *Beresford-Hope* v. *Lady Sandhurst* (4), founded on by the respondents, does not apply, because the decision depended on the interpretation of one special section; neither does the case of *Hall* v. *Incorporated Society of Law Agents.* (5) There it was decided that a woman could not become a law agent, but the case has no application to parliamentary elections. The common law there was that men only had been law agents. It also depended on the interpretation of particular sections of Acts. In *Earl Beauchamp* v. *Madresfield* (6) it was decided that peers had no right to vote at parliamentary elections, on the ground that they were excluded by a resolution of the Commons. That case was followed by *Marquis of Bristol* v. *Beck* (7) and decided on the same ground, but those cases were no authority in this. *Chorlton* v. *Kessler* (8) and *Wilson* v. *Town Clerk of Salford* (9): these cases followed *Chorlton* v. *Lings.* (10) In *Wilson* v. *Town Clerk of Salford* (9) a woman appealed against the refusal of the revising barrister to allow her name to remain on the register. It was held that as "person" took its force from "man" in a previous section she was not a person who could appeal to have her right to be registered established. The *Oldham Case* (11) also does not apply. That was an election petition after the Act of 1867, and the decision there also was that a woman was not a "man." But here the

(1) (1739) 7 Mod. 263.
(2) Ibid. p. 271.
(3) Ibid. p. 265.
(4) (1889) 23 Q. B. D. 79.
(5) (1901) 3 F. 1059.
(6) (1872) L. R. 8 C. P. 245.
(7) (1907) 23 Times L. R. 224.
(8) (1868) L. R. 4 C. P. 397.
(9) (1868) L. R. 4 C. P. 398.
(10) L. R. 4 C. P. 374.
(11) (1869) 1 O'M. & H. 151, 159.

appellants are given the right under a different word, namely, "person." *Stowe* v. *Jolliffe* (1) was decided on s. 7 of the Ballot Act, 1872 (35 & 36 Vict. c. 33). But the Ballot Act, except part 3, as to personation, expressly states (s. 31) that that Act has nothing to do with the universities. *Chorlton* v. *Lings* (2) and *Brown* v. *Ingram* (3) dealt with county and burgh elections. In both it was decided that a woman could not be put on the voting register. Those cases differed from this in three points. Firstly, the women there were claiming to be put upon a parliamentary voting register. Here the appellants are admittedly upon a register. Secondly, they were old franchises; this is a new franchise. And, thirdly, in the special sections of the Franchise Acts of 1867 and 1868 for England and Scotland, dealt with in those cases, it is the word "man" that is being construed. Here it is the word "person"; therefore those cases are entirely different in their main aspects. Willes J. said in *Chorlton* v. *Lings* (2): "Yet, to use Mr. Butler's expression, the right must now be considered as 'extinct,' or perhaps, inasmuch as in our system there is no negative prescription against a law, it may be more correct to say that the right never existed." That statement is inconsistent in itself; for first he admits the right has existed, then he says it is better to say it never did exist. Lord M'Laren in the Court below said, after giving some historical facts, "We must conclude that it was a principle of the unwritten constitutional law of the country that men only were entitled to take part in the elections of representatives to Parliament." That declaration is unsound. However, it does not matter whether there was an unwritten constitutional law at that time; the statutes as they stand have overturned it. When the right was conferred on women to sit as mayors or chairmen of county councils a special clause was put in depriving them of the right to sit as magistrates, otherwise it would have followed by inference that they had the right to sit on the bench as magistrates. Here women are on the register, but there is no express enactment that they have not the right to vote. The Act of 1868 has as much force to-day as it had in 1868, and if the Legislature of

(1) (1874) L. R. 9 C. P. 734. (2) L. R. 4 C. P. 374, 391.
(3) (1868) 7 M. 281.

H. L. (Sc.) 1908 NAIRN v. UNIVERSITY OF ST. ANDREWS.

to-day do not wish women to have the vote it is for them to pass a statute to the effect that now that women are admitted to graduation this word "person" is not to mean "person," but is to mean "male person." This was done in the Netherlands. Graduation in medicine in the Netherlands carried with it the right to vote, and the first woman who took the degree claimed the right. The case was postponed, and during the postponement the Legislature brought in a repealing enactment. The respondents say that women are by the common law disqualified by reason of their sex from the exercise of the parliamentary franchise. But, whatever may be the effect of the common law, the enactment on which the appellants found is sufficiently express to override the common law and to give the franchise to women graduates in the Scottish universities. The common law which is consistent with the statute law is to be preferred to the common law which is inconsistent with the statute. Lord Salvesen said in the Court below (1): "Holding, therefore, that the word 'person' is open to construction, I feel constrained to construe it as equivalent to 'male person.' An alternative view would be to construe the word as of common gender, and to hold that as women were at common law legally incapacitated from exercising the parliamentary franchise, their claim is excluded by the clause 'not subject to any legal incapacity,' which strikes at peers and aliens equally with women." But the word is not open to construction. He introduces the ambiguity by a wrong assumption. He admits that his two grounds of judgment are inconsistent with each other and gives an ambiguous decision. It is not necessary to take two views when one is definite. As to aliens, they were excluded expressly: see the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 2, sub-s. 1, and the Aliens Freehold Act, 1844 (7 & 8 Vict. c. 66), s. 5. It required an express provision to take from aliens who had the right to hold freehold property the right which accompanied property of voting at parliamentary elections. Willes J. in *Chorlton* v. *Lings* (2) founded his decision on the fact that women had not the right to act as suitors of the county courts, in which capacity it had been suggested that they must have had the right of voting. But women did attend

(1) (1898) S. C. 113, 116. (2) L. R. 4 C. P. 374, 390, 391.

and could be suitors at the county court before the year 1405: see Rotuli "Hundredorum of 1818," vol. 2, p. 62, Lady Joan le Engles . . does suit to the county, and Charter Roll 37 Hen. iii., membrane 8 (6.), "Abbess of Tarente exempt from suits at the county courts." And by the statute 7 Hen. 4, c. 15, "all they that be there present" (at the county court) "as well as suitors . . . . shall attend to the elections of the knights for the Parliament." Lord M'Laren said in the Court below (1) that "In Scotland the borough members were elected by town councils." That was not so in all boroughs. In Peebles in the reign of William and Mary a writ for returning a member of Parliament said that those who were to vote were burgesses who were not papists—that was the only exclusion. Women were burgesses in that town, and they took part in the business of the town by voting at elections in the town. In a Blue-book, entitled "Parliamentary Writs and Returns," of 1878 (2), p. 407, there is a return dated April 9, 1572, from the borough of Aylesbury. The two members returned were Thomas Lychefelde and George Burden, and a note states these members were returned by Dorothy, widow of Sir Thomas Packyngton, who was the one voter. Brady on Boroughs, appendix, p. 50, shews that it was in virtue of a writ sent to her in the 14th year of Elizabeth by the House of Commons that she elected these members. In the same Blue-book, pp. 391, 394 (see also note on same pages), there are reported two other returns of the borough of Gatton in the years 1554 and 1555, and there Dame Elizabeth Coppley of Gatton nominated two members for the borough: see also Loseley M.S. (Kempe's), p. 242 (note). There is quoted a letter from Elizabeth's Secretary of State Walsingham. It is apparent that at least in burgage tenure women had the right to vote at that time. For although Walsingham objected to the men Mrs. Coppley might choose, his objection was founded, not on her incapacity to elect them, but because "It is not thought conveniyent, for that she is known to be evill affected, that she should beare any swaye in the choice of the

(1) (1908) S. C. 113, 120.

(2) Parliament—Return of Every Member of Lower House of Parliament from 1213 to 1874, vol. 62, part 1, 1878.

H. L. (Sc.) 1908

NAIRN v. UNIVERSITY OF ST. ANDREWS.

said burgesses." Skene's Scots Acts of 1587, p. 78: "Reservant alwaies and exceptand to al Archbishoppes, Bishoppes, Abbotes, Priores, Prioresses . . . . of the estait of Prelates and quhilkis before had or hes voite in Parliament." This shews that prioresses were included in those who had votes for Parliament men. There is no constitutional principle against the votes of women, but even if there were, to argue from it is to beg the whole question. It is on this question-begging basis that the decision of the Extra Division rests. There the so-called principle that women are excluded from voting is upheld even when it makes the statutes to be construed contradict themselves. If a common law produces absurdity in a statute law, the statute law must be taken as overriding the common law. Here the assumed principle does produce absurdity, and therefore the statutes prevail.

The judgment below rested altogether on the assumption that the custom prevailing of women not voting is a constitutional principle, but a custom of this kind cannot rank as a constitutional principle. In ancient days the franchise was looked on as a burden—the journeys to the polls involved expense and fatigue, and the polling places were scenes of riot and disturbance; thus the custom grew of women not voting. Most of these reasons have passed away, but the custom remains. A custom the reasons for which have passed away cannot rank as a constitutional principle; moreover, this custom has no bearing on the universities franchise, which franchise was of recent statutory creation and is utterly different from the other and more ancient franchises. Men graduates vote not as "men," but as being graduates; women graduates have the identical qualification in virtue of which men vote, and the vote should be given to them also. The three statutes of 1868, 1881, and 1889, taken together, give the right. The Acts of 1868 and 1881 give the franchise to graduates, the Act of 1889 made it possible for women to become graduates. The universities were empowered to give the degree unconditionally without any provision that it should not carry the vote, as in the Alien Acts and others, and it is too late now to say it was not intended to be given unconditionally. It was in 1867 that John Stuart Mill brought forward his famous amendment, and it was scarcely conceivable when the change was

made from "man" to "person" in the 1868 Act that it was under the conviction that only men could then and in the future become graduates. It was much more probable that the change was made recognizing the possibility that women might at no distant date be included. A plain, straightforward reading of the statutes confers on the appellants the franchise and shews that the common law or custom is no bar to their availing themselves of the right to vote for a university member of Parliament.

Scott Dickson, D.F., and *H. P. Macmillan* (both of the Scottish Bar) appeared for the respondents, but were not called upon.

The House took time for consideration.

1908. Dec. 10. LORD LOREBURN L.C. My Lords, this appeal has been argued temperately with the evident knowledge that your Lordships have to decide what the law in fact is and nothing beyond that simple question.

Two points were raised by the appellants. The first and main point was that they were entitled to vote at an election of a member to serve in Parliament for the Universities of St. Andrews and Edinburgh. The second was that at all events they were entitled to receive voting papers and on tendering their votes to have their claim decided by the authority set up under the Universities Elections Amendment (Scotland) Act, 1881.

I will take these contentions in order.

In regard to the alleged right of voting the appellants assert that, if ancient records are explored, there is evidence of women having enjoyed this right, and no adequate ground for affirming a constitutional or common law disability on the score of sex; and, further, that the Representation of the People (Scotland) Act, 1868, taken with the Universities (Scotland) Act, 1889, and the Ordinances made under the last-mentioned Act, do upon their literal construction confer upon women, if they comply with the requirements, a right to vote for university members.

Now, my Lords, it may be that in the vast mass of venerable documents buried in our public repositories, some of authority, others of none, there will be found traces of women having taken some part in parliamentary elections. No authentic and plain

H. L. (Sc.) 1908 NAIRN v. UNIVERSITY OF ST. ANDREWS. Lord Loreburn L.C.

case of a woman giving a vote was brought before your Lordships. But students of history know that at various periods members of the House of Commons were summoned in a very irregular way, and it is quite possible that just as great men in a locality were required to nominate members, so also women in a like position may have been called upon to do the same; or other anomalies may have been overlooked in a confused time. I say it may be so, though it has not been established. A few equivocal cases were referred to. I was surprised how few. And it is the same in regard to judicial precedents. Two passages may be found in which judges are reported as saying that women may vote at parliamentary elections. These are dicta derived from an ancient manuscript of no weight. Old authorities are almost silent on the subject, except that Lord Coke at one place incidentally alludes to women as being under a disqualification, not dwelling upon it as upon a thing disputable, but alluding to it for purpose of illustration as a matter certain. This disability of women has been taken for granted.

It is incomprehensible to me that any one acquainted with our laws or the methods by which they are ascertained can think, if, indeed, any one does think, there is room for argument on such a point. It is notorious that this right of voting has, in fact, been confined to men. Not only has it been the constant tradition, alike of all the three kingdoms, but it has also been the constant practice, so far as we have knowledge of what has happened from the earliest times down to this day. Only the clearest proof that a different state of things prevailed in ancient times could be entertained by a Court of law in probing the origin of so inveterate an usage. I need not remind your Lordships that numberless rights rest upon a similar basis. Indeed, the whole body of the common law has no other foundation.

I will not linger upon this subject, which, indeed, was fully discussed in *Chorlton* v. *Lings*. (1) If this legal disability is to be removed, it must be done by Act of Parliament. Accordingly the appellants maintain that it has in fact been done by Act of Parliament. They say that the Act of 1868, while confining to men the franchise described in other sections, adopts different

(1) L. R. 4 C. P. 374.

language in s. 27, using in that section the word "persons." I agree that the word "persons" would prima facie include women. But, in speaking of "persons," this same section limits them to those who are "not subject to any legal incapacity." I cannot doubt that by this limitation, if not otherwise, are excluded all such persons as may by law be disabled from voting. Peers are excluded, as are women. So, also, are others.

If the word "persons" in s. 27 of the Act of 1868 is wide enough to comprise women, then they are shut out by the exception of those subject to a legal incapacity. If the word "persons" is not wide enough to include women, then there is nothing in any Act of Parliament that gives the smallest foothold for the appellants' contention.

I will only add this much as to the case of the appellants in general. It proceeds upon the supposition that the word "person" in the Act of 1868 did include women, though not then giving them the vote, so that at some later date an Act purporting to deal only with education might enable commissioners to admit them to the degree, and thereby also indirectly confer upon them the franchise. It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the Legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are. Learned volumes have been written on this single subject. It is not, in my opinion, necessary in the present case to apply any of those canons of construction. The Act invoked by the appellants is plain enough to repel their contentions.

In regard to the second point made by the appellants, namely,

H. L. (Sc.) 1908

NAIRN v. UNIVERSITY OF ST. ANDREWS.

that they are entitled to receive voting papers, in my opinion they are not so entitled, because the Act only says that voters shall receive them. They are not voters.

For these reasons I respectfully advise your Lordships to dismiss this appeal with costs.

LORD ASHBOURNE. My Lords, the claim of the appellants is founded on their status as graduates of one of the two universities named. By the Universities (Scotland) Act, 1889, the commissioners thereby appointed were empowered to make ordinances "to enable each university to admit women to graduation in one or more faculties," and to provide for their instruction. By the Ordinance of 1892 this power was exercised, and it was declared "to be in the power of the university court of each university to admit women to graduation in such faculty or faculties as the court shall think fit."

The first thing which at once attracts attention is that neither the Act nor the Ordinance gives the slightest hint that the franchise was at all in contemplation, and there is no allusion to the register of the general council. The appellants, therefore, must look elsewhere to support their claim, and they accordingly in their careful arguments rely on the Representation Act of 1868 and the Universities Elections Act of 1881.

By s. 27 of the Representation Act of 1868 a vote is given to "every person whose name is for the time being on the register, if of full age and not subject to any legal incapacity," and the appellants claim that they come within the description—that they are persons whose names are on the register. The case turns mainly on the meaning of the word "person" in that Act. It is an ambiguous word, and must be examined and construed in the light of surrounding circumstances and constitutional principle and practice. Holding the views I do, it is not necessary I should discuss the words "legal incapacity." I should add, however, that I see nothing to induce me not to assent to what the Lord Chancellor has said in his judgment.

In 1868 the Legislature could only have had male persons in contemplation, as women could not then be graduates, and also

because the parliamentary franchise was by constitutional principle and practice confined to men. The appellants strongly relied on the use of the word "man" in some earlier sections dealing with counties or boroughs. It is, however, to be noted that in six later sections before the 27th the word "person" is used instead of "man," and must mean "male person," and I cannot hold that the same word "person" in s. 27 could have a different meaning, even if I could ignore other arguments. I can give but little weight to the few old cases referred to, which are obscure and unexplained, and which are opposed to uninterrupted usage to the contrary for several centuries.

I can, then, entertain no doubt that, when examined, "person" means male person in the Act. The parliamentary franchise has always been confined to men, and the word "person" cannot by any reasonable construction be held to be prophetically used to support an argument founded on a statute passed many years later.

If it was intended to make a vast constitutional change in favour of women graduates, one would expect to find plain language and express statement. So far from the Act giving any intimation of a serious innovation, it guards in a saving clause, subject to the provisions of the Act, all existing "laws, customs and enactments."

But here the Act of 1889 and the Ordinance are absolutely silent on the subject and only refer to graduation and academic arrangements. The Act of Parliament itself does not confer the right of graduation, and only delegates that authority to commissioners, who did not directly exercise the power, but ordained that it should be in the power of each university court "to admit women to graduation in such faculty or faculties as the said court may think fit," and directed how academic functions are to be provided for.

It is to my mind impossible to imagine that the Legislature should have conferred by a delegation to commissioners the power either of extending the franchise themselves to a perfectly new class, or by devolution passing on that power to university courts—a power always jealously kept in its own hands. It is inconceivable that Parliament should do this by implication

H. L. (Sc.) 1908 NAIRN v. UNIVERSITY OF ST. ANDREWS. Lord Ashbourne.

without a word to indicate the intention, and should thus indirectly place a new construction on an Act passed years before and reverse a settled and uniform constitutional practice and principle.

Having reached this conclusion, I must hold that there is no substance in the argument that the appellants were entitled to be sent voting papers. It is true that voting papers should be sent to voters; but if they were not voters, where was the right and where was the damage?

In my opinion the judgments of the Lord Ordinary and of the Lords of the Extra Division were quite correct, and this appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, the central fact in the present appeal is that from time immemorial men only have voted in parliamentary elections. What the appeal seeks to establish is that in the single case of the Scottish universities Parliament has departed from this distinction and has conferred the franchise on women. Clear expression of this intention must be found before it is inferred that so exceptional a privilege has been granted.

We had not the assistance of counsel; but fortunately the question is not difficult. In truth the case of the appellants rests on a very narrow and slender basis, and that is the word "person" in the 1st and 2nd sub-sections of s. 28 of the Representation of the People (Scotland) Act, 1868. It is said that, while in the clauses relating to counties and burghs the persons enfranchised are described as "male persons," the neutral term "person" is used in describing the university elector, and the suggested inference is that this was done deliberately so as to admit women.

I am afraid, however, that a much more superficial reason was what led to the variation. If we turn to the University (Scotland) Act, 1858, which set up the university councils (the bodies which constitute the constituencies), we find that the word used is "person." Now this is exactly what Parliament would naturally do: minded to give votes to the members of the general councils, it turns to the description of them in the Act

which established those councils and adopts the term there used.

This is the genesis of the enfranchising section; what is its effect? Now the "persons" so described were, in fact, solely men; for in 1858 and in 1868 the universities did not receive women as students, and did not confer on them degrees. It is obvious, therefore, that the persons contemplated in the enfranchisement of the Scotch graduates were men.

As the case of the appellants is entirely one of words, it may be added that in 1858, as in 1868, the avail of the words "male persons" as distinguished from "persons" had been greatly reduced by Lord Brougham's Act, so that the choice of the word "person" had of itself the smaller significance in the direction of including women. The one expression, like the other, needs to be read in the light of the subject-matter.

The case of the appellants has, as I have said, the word "person" (in the Act of 1868) for its basis, but it is necessary to remember that it is only by virtue of an Ordinance of the University Commissioners under an Act of 1889 (dealing purely with academic as distinguished from political matters) that women were made eligible for graduation, and thus were introduced into the university councils. Now it must be allowed that if Parliament has, by this means, conferred the franchise on women, it has taken the most roundabout way to do it. Whichever view be taken of the merits of the question whether women should vote for members of Parliament, it is at least a grave and important question for Parliament to decide. This question, according to the theory of this appeal, Parliament devolved on a Royal Commission about the details of academic affairs, which had power, moreover, to provide graduation (and by consequence the franchise) for women in one university or in all, according to its absolute discretion. It is difficult to ascribe such proceedings to Parliament and at the same time retain the conventional respect for our Legislature.

I have only to add that if I have not in this judgment relied on the words about legal incapacity, it is not that I do not consider the argument on them to be legitimate. But I prefer broader grounds, and I think that a judgment is wholesome and

H. L. (Sc.) 1908 NAIRN v. UNIVERSITY OF ST. ANDREWS.

of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities.

LORD COLLINS concurred.

Ordered that the interlocutors appealed from be affirmed and the appeal dismissed with costs.

Lords' Journals, December 10, 1908.

Agents for appellants: *Neish, Howell & Haldane, for Wm. Purves, W.S., Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for W. & J. Cook, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1908 *Dec.* 3.

THE EARL OF BUCHAN . . . . . APPELLANT;

AND

THE LORD ADVOCATE . . . . . RESPONDENT.

Revenue—Entail—Propulsion of Fee—"Acceleration" of Succession—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15.

By s. 15 of the Succession Duty Act, 1853, "Where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

The late Earl of Buchan being in 1872 heir of entail in possession of certain entailed estates in Scotland under an entail prior to 1848, the appellant, who was his eldest son and heir apparent, agreed with his father to propel the entailed estates so that the appellant should enjoy them as from September 13, 1871. The father and son thereupon executed a disposition of the entailed estates, and the father's interest therein ceased. But inasmuch as the estate could not be disentailed until the appellant attained the age of twenty-five years, it was further agreed that when the appellant attained that age the estates should be disentailed. This was done in 1875. The appellant also undertook to

raise a large sum of money on the estates to pay off the debts of the Earl of Buchan. In 1898 the late Earl of Buchan died, some years after he had ceased to be owner of the entailed estates. The Crown claimed succession duty under ss. 2 and 15 of the Succession Duty Act of 1853, founding their claim on the ground that under the original deed of entail of 1664 the appellant had an expectant right of succession, and this right would open to him by devolution on the death of the late Earl of Buchan, his father, and the transaction above referred to, by which there was a propulsion of the estates to the next heir, namely, the appellant, was an acceleration of the succession:—

Held (affirming the decision of the First Division of the Court of Session), that succession duty was payable by the appellant under s. 15 of the Act on the ground that he had a title to the succession capable of being "accelerated," and that title had been accelerated by the surrender or extinction of the father's prior interest.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellant was the proprietor of the lands and estates of Strathbrock, Kirkhill, and others in the county of Linlithgow, and he was sued by the respondent, the Lord Advocate, acting on behalf of the Commissioners of Inland Revenue, to deliver an account of his succession to said lands, "so that the amount of succession duty payable by him upon the death of his predecessor the late David Stuart Erskine, Earl of Buchan, in respect of said lands and estates may be ascertained." The late Earl of Buchan was in 1872 heir of entail in possession of the entailed estates of Strathbrock, &c., in the county of Linlithgow, under an entail dated 1664 and recorded in the register of tailzies in 1720. The appellant, who was his eldest son and heir apparent, was born on February 27, 1850. As the law then stood the Earl of Buchan was entitled to disentail the said estates only with the consent of his heir apparent, whose consent could only be given on his attaining twenty-five years of age. The Earl of Buchan was in embarrassed circumstances, and had been for a considerable time past under trust, and shortly before 1872 his estates were sequestrated. By an agreement dated March 23 and 27, 1872, he agreed to execute a deed of propulsion of the entailed estates and also a disposition of another estate held by him in fee simple called Ammondell and certain

(1) (1907) S. C. 849.

H. L. (Sc.) 1908

BUCHAN (EARL) v. LORD ADVOCATE.

reversionary rights to the appellant as from September 13, 1871. The Earl of Buchan and the appellant further bound themselves by the said agreement, on the appellant attaining twenty-five years of age, to concur in disentailing the entailed estates so as to vest them absolutely in fee simple in the appellant. The appellant further undertook, simultaneously with the granting of the conveyance in his favour, to provide, by borrowing on the estates conveyed to him or otherwise as he should think fit, a sum of 46,000*l.* to be paid to the Earl of Buchan's trustees and applied in satisfaction of his liabilities. The appellant further undertook to provide for annuities and for annual payments amounting in all to nearly 3000*l.* which then affected the estates, and to provide additional annuities of a considerable amount. In pursuance of the said agreement the Earl of Buchan on May 24, 1872, executed a disposition propelling the entailed estates to the appellant, and simultaneously executed in his favour a disposition of the fee simple estate. The appellant's title to both the entailed and the fee simple estates was completed by registration of the dispositions in the appropriate register of sasines on September 18, 1872. The appellant duly implemented the obligations undertaken by him as to providing the 46,000*l.* and paying the annuities. In February, 1875, the appellant attained the age of twenty-five, and on March 19, 1875, he and the Earl of Buchan together presented to the Court of Session a petition for authority to disentail the entailed estates. The petition set forth that Lord Buchan had succeeded to the said entailed estates as nearest and lawful heir male of tailzie and provision and that he had propelled the whole of the said entailed estates to the appellant and the heirs male of his body, whom failing the other substitute heirs of entail, and that the appellant was heir of entail in possession. The Court of Session on July 6 and 20, 1875, granted the prayer of the petition, and the instruments of the disentail were duly recorded in the register of entails on August 31, 1875, and in the register of sasines on September 17, 1875. The Earl of Buchan died on December 3, 1898, over twenty-six years after he had ceased to be owner of the entailed estates and over twenty-three years after their disentail. The respondent's claim

was founded on ss. 2 and 15 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). (1) The respondent did not maintain that any succession duty was exigible in respect of the fee simple estate of Ammondell. The deed of propulsion was in exact accordance with the deed of tailzie of 1664.

The Lord Ordinary (Lord Johnston) held that the Crown were not entitled to succession duty; but that decision was reversed by the First Division of the Court of Session, who gave judgment for the Crown.

The Lord President (Lord Dunedin), after giving the facts, continued:—The late Earl died on December 3, 1898, survived by his son Lord Cardross, who then succeeded to the title. The Crown now lay claim to succession duty on the entailed estates so propelled in 1872 to the present Earl, and the record leaves it somewhat in doubt whether the claim does not extend to succession duty on the fee simple estates also.

As regards the last sentence, no argument has been adduced to your Lordships as to the fee simple estate. I do not see how it could possibly be contended that a disposition of fee simple estates inter vivos, followed by complete possession on the part of the disponee, could give rise to a claim for succession duty at the death of the disponer twenty-six years afterwards, and that matter may be dismissed once for all.

(1) By s. 2 of the Succession Duty Act, 1853, "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession,' and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote settlor, disposer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

By s. 15, ". . . . Where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

H. L. (Sc.) 1908

BUCHAN (EARL) v. LORD ADVOCATE.

The real and only question is as to the entailed estates. Now the Lord Ordinary has decided that a duty is not payable, and his judgment, abbreviated, consists of two propositions. Had the old entail subsisted, then, on Lord Buchan's death, the present Lord Buchan, whom for the sake of clearness I shall hereafter call Lord Cardross, would have made up his title to his father as heir of tailzie and provision, and would have paid succession duty, his father being his predecessor, because, as held by the House of Lords in the cases of *Lord Saltoun* v. *Advocate-General* (1) and *Earl of Zetland* v. *Lord Advocate* (2), the estate would have passed by devolution by law. But, in the actual circumstances, when that event happened, the old entail was gone, and Lord Cardross did not need to make up any title under it, because he was already holding under the deed of propulsion, which had operated as a disposition inter vivos twenty-six years before, followed by a disentailing deed three years afterwards. No succession duty was therefore due under s. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). That is the first proposition. The second is that so far as s. 15 is concerned it does not alter the matter. The provision of s. 15 in question is as follows: (His Lordship read the section.) His Lordship holds that the propulsion was not a surrender or extinction of prior interests. It is obvious that the soundness of these views really depends on what is the true nature of a deed of propulsion, but before I discuss that I wish to make a few general observations.

It has been pointed out many times by the highest tribunal that the Succession Duty Act is drawn in untechnical language, and that it must consequently be applied to the differing technical systems of the settlement of land by title in England and Scotland so as to preserve harmony in the practical working of the Act in the two kingdoms. A masterly and authoritative exposition of the similarities and differences of the methods of settling land by title in the two kingdoms will be found in the judgments of Lord Selborne and Lord Blackburn in *Lord Zetland's Case* (2), which are worthy of the most careful perusal. (Here

(1) (1860) 3 Macq. 659. (2) (1878) 3 App. Cas. 505.

I think it not immaterial to point out a curious slip—I will advert to the materiality of it afterwards—into which the Lord Ordinary has fallen, where he quotes a passage of Lord Selborne's opinion in *Lord Zetland's Case* (1) as a description of the estate of a Scottish heir of entail taking from a previous holder, whereas what his Lordship is giving is really the description of the estate of an English tenant in tail who takes from a previous tenant in tail, who either was unable to bar owing to some special peculiarity, or who being able did not do so.) It follows from the general proposition above stated that English authorities, though in one sense not directly in point, are at the same time of use and weight. And though I always feel that any lawyer, in examining authorities which deal with a system of real rights unfamiliar to him, is handling periculosœ plenum opus aleœ, yet I feel myself constrained to do so in a subject like this. I say so because I think the leading case undoubtedly on this branch of the law is the *Duke of Northumberland's Case.* (2) In that case the sixth Duke of Northumberland being tenant for life, and his eldest son, afterwards seventh Duke, tenant in tail, executed together a disentailing deed and conveyed a piece of land to Lord James Murray. Lord James died, and was succeeded by his daughter Miss Caroline Murray, who paid succession duty as succeeding to her father. Thereafter the sixth Duke died, and the Crown claimed and obtained a succession duty from Miss Caroline Murray, becoming due on the death of the sixth Duke and calculated as an annuity on Miss Murray's life from that time. The actual point in dispute which was the matter of decision, namely, whether an alienee could be called on to pay a duty when such alienee had already paid one duty, is of course not relevant to the matters which we have to decide. But I have called this case the leading authority because of the lucid exposition of the Act given by Lord Macnaghten, and concurred in by the Lord Chancellor (Earl of Halsbury), and the further opinion given by Lord Davey. Now in the very short opinion which the Lord Chancellor himself pronounced there is one sentence which I think really settles the

(1) 3 App. Cas. 505, at p. 519; 5 R. H. L. at p. 58.
(2) [1905] A. C. 406.

H. L. (Sc.) 1908 BUCHAN (EARL) v. LORD ADVOCATE.

kind of question which we have to consider in this case. His Lordship says: "Two observations I wish to make; . . . . One is that a succession within the Act once established, no manipulation of the parties afterwards can get rid of it." Of course it must be kept in view that something more is needed before the Crown can claim the duty, namely, that the person from whom it is claimed has become beneficially entitled to the succession. Now, was there or was there not a succession established, to which Lord Cardross became beneficially entitled, by what was done in 1872? For if there was, then, in the words of the Lord Chancellor, no subsequent manipulation can get rid of it, and therefore the Lord Ordinary's argument, so far as based on the effect of the subsequent disentail, falls to the ground.

That brings me straight to the question of the nature and effect of the deed of propulsion. It has certainly surprised me to find how little authority there is upon the subject, and how obscure seems to be the origin of such a deed. Stair, Bankton, Erskine, and Walter Ross (though it is fair to say it scarcely fell within the scope of his work) are all silent on the point. The earliest mention I have happened to find is a passing mention in the argument in *Creditors of Gordon* v. *Gordon* (1), and another in *Sutty's Case* (2), and yet it is there spoken of as a recognized proceeding. Under these circumstances it is obvious, I think, that it crept in without actual authority, just as I had occasion to observe, in *Cadell* v. *Allan* (3), excambions of glebes crept in without any particular sanction. Perhaps, like much else in Scottish conveyancing, it had its origin in the desire to create votes. I need scarcely remind your Lordships that a vote in pre-Reform Act days depended on the holding of land of so much valued rent direct from the Crown, and the deed of propulsion offered obvious facilities for the attainment of this end. Be that as it may, it is undoubted that it existed from an early period. Further, it is obvious that under the state of the law at that time it could but rarely happen that it was any one's interest (assuming the deed to be in proper form, i.e., a true repetition of the fetters of the

(1) (1749) Mor. Dict. 15384. (2) (1758) 5 Bro. Supp. 866.
(3) (1905) 7 F. 606.

existing entail) to challenge. At that time there was no possibility of disentailing depending on the date of the birth of the heir in possession in reference to the date of the entail; so that there could be no question of a remoter substitute being cut out by a disentailing deed before the natural time. There could be no question of succession duty, for the Succession Duty Act had not been passed. Accordingly, in the ordinary case the remoter substitute, who so far as title went could have raised the question, could have no interest. For either the propelling deed was no contravention, or, if it was, its only effect was to irritate the propeller's right under the entail and vest it in the propellee. The case which might have raised the matter acutely does not seem to have occurred in a pure form. I figure the case of an entail which forfeited on contravention the right not only of the contravener but also of the issue of his body. If that question had been mooted early in the eighteenth century, I confess to a strong idea that it would have been decided adversely to the deed. The case, indeed, very nearly arose in the pure form, though it was complicated by a further proposed alienation by the propellee, in the case of *Dalrymple* v. *Countess of Glencairn* (1) in 1783. In that case an entail had been executed by Governor Macrae of estates in Ayrshire, but the prohibitive clauses were only directed against the nominatim substitutes, and not against the heirs of these substitutes' bodies. Mrs. Dalrymple, who succeeded as a nominatim substitute, executed a disposition in favour of her son, being her heir apparent. (It is noticeable that the term "deed of propulsion" is not used, and it may be doubted if it had been invented by this time.) He then, as unaffected by the fetters, entered into a minute of sale. The case was then tried by means of a declarator against a remoter heir, and the judgment is thus reported: "The Court were of opinion that this bargain, if carried into execution by Mrs. Dalrymple, would infer a contravention of the entail." This case was appealed to the House of Lords and was affirmed. (2) There is no note of the judgment given, only that taken from the journals of the House that the judgment is affirmed. But it is rubricked thus: "An entail prohibited

(1) (1783) Mor. Dict. 15433. (2) (1784) 6 Pat. App. 807.

H. L. (Sc.) 1908 BUCHAN (EARL) v. LORD ADVOCATE.

the sale of the estate, and laid the fetters on the 'substitutes before mentioned and described by name.' Held that this was sufficient to include within the fetters the descendants of the body of those substitutes." I have the gravest doubts as to whether this rubric is anything more than a mistake of the reporter. The date of the case was 1784. Mr. Paton's first volume of reports appeared only in 1825, and this is the sixth volume. He deplores, in the preface to the first volume, the absence of all material for the grounds of judgment in the earlier cases, and I take it that he would have before him only the cases and the entry in the journal. I have examined the appeal cases, and though it is true that one of the arguments in the respondent's case is that the fetters affected the heirs of the bodies of the nominatim substitutes, it is not, any more than it was in the Court of Session, the argument that she rested on. And if the House of Lords decided on that ground, they decided against what was afterwards found to be undoubted law, namely, that each class of heirs must clearly be affected by the fetters, and that to express the prohibition so as to include only one class will not do: see, e.g., *Brown* v. *Macgregor* (1) and *Dalyell and Selkrig* v. *Dalyell.* (2) The Court of Session judgment seems to me clearly put on the ground that a deed of propulsion could be quarrelled the moment it in any way prejudiced the interest of a remoter substitute, and my view of the decision is, I see, borne out by a remark of Lord Alloway in the case of *M'Leod* v. *M'Kenzie* (3), presently to be noticed. For the moment, however, let me revert to the history of the phrase "propel" or "deed of propulsion." George Joseph Bell first mentions it in the 3rd edition of his Principles, date 1833 (it was not in the 2nd edition), where in s. 1749 ad fin., treating of the prohibition against alienation, he says: "And it has been held not to prevent a conveyance to an heir apparent so as to propel the estate." In subsequent editions "apparent" is changed to "presumptive," but I doubt if he is there using the term "presumptive" in its strict sense. When, however, I come to his authorities, it is curious how little they support the

(1) (1837) 15 S. 837; affirmed (1838) 3 S. & M. App. 84.
(2) (1809) 15 Fac. Dec. 281.
(3) (1827) 6 S. 77.

proposition. He first quotes the case of *Creditors of Gordon* v. *Gordon*. (1) I have examined all the reports of that case and can find only the casual reference in argument to which I have alluded. The actual point decided in *Creditors of Gordon* v. *Gordon* (1) had nothing to do with it. Then comes *Sutty's Case*. (2) That was a question about a tack, and the report bears: "The Lords found that such a tack could be assigned to the eldest son, in the same manner as a ward fee could formerly have been conveyed to the heir, or as a tailzied estate can yet be disponed to the next heir of tailzie." This is obviously rather a reference to an acknowledged practice than a judgment, which on the facts of the case it could not be. Then comes *Dalrymple's Case* (3), which I have already examined, and which is obviously no authority for the proposition. Then there is the case of *M'Leod* v. *M'Kenzie*. (4) Now that case decided that a deed of propulsion in favour of an heir presumptive did not give a good electoral qualification, and Lord Alloway went on to say expressly that it had never yet been decided that even a deed of propulsion to an heir apparent was good, and that in the only case it had ever been tried, namely, *Dalrymple's Case* (3), it had been found to be bad, thereby taking the same view of the import of *Dalrymple's Case* (3) as I do. Thus far, therefore, of the authorities quoted none support, and some even contradict, the proposition, and there is only left one more, namely, the case of *Craigie* v. *Halket Craigie*. (5)

Notwithstanding all this, deeds of propulsion of the innocuous character I have indicated were doubtless fairly common, and the practice was eventually given statutory recognition by the 22nd section of the Entail Act of 1853, which enacts that "where any heir of entail in possession of an entailed estate created before the passing of the said Act" (i.e., the Rutherfurd Act) "shall have lawfully propelled, or shall hereafter lawfully propel, such estate, under reservation of his own liferent, to the heir entitled to succeed him therein, any application which has been

(1) (1749) Mor. Dict. 15384; Elchie's Tailzie, No. 37; 5 Bro. Supp. 774.
(2) (1758) 5 Bro. Supp. 866.
(3) 6 Pat. App. 807.
(4) 6 S. 77.
(5) (1817) 19 Fac. Dec. 408.

H. L. (Sc.) 1908 BUCHAN (EARL) v. LORD ADVOCATE.

made or shall be made by him under the recited Act or under this Act . . . . shall be equally effectual in all respects as if he had not propelled the succession, provided the consents of the persons, whose consents would have been required to such application if he had not propelled the succession as aforesaid, be obtained thereto." This section had reference chiefly to a decision in *Lord Wharncliffe's Case.* (1) And the same thing is repeated in fuller form in s. 13 of the Act of 1868.

The most modern authority is the case of *Viscount Dupplin* v. *Hay* (2), where it was decided that a propellee of part of an entailed estate was not an heir of entail in possession in the sense of the entail statutes, so as to be able to disentail; and Lord Kinloch gave it as his opinion that a propulsion of part of the estate was invalid per se. I mention, to shew that I have not overlooked it, the case of *Skeete* v. *Buchanan* (3), but the case is of no authority—being decided only in the Registration Appeal Court—the grounds of judgment being different with the different judges, and the result being contrary to what was decided by the Inner House in *M'Leod* v. *M'Kenzie* (4) and in *Viscount Dupplin* v. *Hay.* (2) There is also the case of *Turnbull* v. *Hay Newton* (5), but it ranks more appropriately with another class of cases which I shall presently mention.

This leaves only the case of *Craigie* v. *Halket Craigie* (6), and this is really the only case which can be said, so far as decision goes, to sanction the practice of propulsion, as it is also the only case in which there is any real discussion of what propulsion is. Unfortunately, the opinions are conflicting, and the result arrived at was, in my humble opinion, wrong. Yet the case is worthy of attention as being really the only discussion of this subject. In that case Mrs. Halket Craigie, of Dunbarnie, heiress of entail in possession, conveyed the estate to her eldest son, Colonel Halket Craigie, under reservation of her liferent, and also with a reservation of full power to exercise every right whatsoever respecting the estates so far as not restricted by the entail. The entail contained a power to burden to a certain extent in

(1) (1852) 24 Scot. Jur. 353.
(2) (1871) 10 M. 89.
(3) (1879) 7 R. 15.
(4) 6 S. 77.
(5) (1836) 14 S. 1031.
(6) 19 Fac. Dec. 408.

favour of younger children. In virtue of this latter reservation Mrs. Craigie granted provisions in favour of her younger children. Colonel Craigie did the same in his marriage contract. He had children, and predeceased his mother. On the mother dying the succession opened to the eldest grandchild, and then the question was raised as to whether the two sets of provisions were effectual. Memorials were ordered, and at advising Lords Balgray, Hermand, and Succoth thought both sets of provisions good—dissentientibus Lord Balmuto and Lord President Hope, who thought the mother's provision good, but the son's bad. I confess to very great difficulty in agreeing with the result arrived at, but the importance of the case is that all the judges look upon the possession of the propellee as a possession under the original entail. Thus Lord Balgray says: "It is understood in the practice of the law of Scotland that an heir in possession may propel the fee to the heir alioqui successurus; and the heir, in so obtaining the fee, has as good a right as if the ancestor were really dead. He is civiliter mortuus." Lord Succoth says: "When Mrs. Halket Craigie put forward the fee in the person of her son, she voluntarily divested herself of the character of heir of entail in possession. From the moment she ceased to have this character, all the right pertaining thereto passed into the person of her son." But if the propellee is really possessing under the original entail, then he is possessing what in English law phrase is called "an estate of inheritance," and not, as the Lord Ordinary here thinks, an estate created by inter vivos disposition.

There is, however, another class of cases which I think may be usefully referred to as throwing light on the subject, and that is the set of cases in which it has been held that it is possible to work off the fetters of an entail by possession for forty years upon an unlimited title. Of these cases, an example may be taken in *Earl of Eglinton* v. *Montgomerie.* (1) The reason of the title being unlimited in that case was that the second entail was not recorded in the register of tailzies, and it is to be inferred from the opinions that a mere deed of propulsion, which no one ever thought of registering in the register of tailzies, was only

(1) (1842) 4 D. 425; affirmed (1843) 2 Bell's App. 149.

H. L. (Sc.) 1908 BUCHAN (EARL) v. LORD ADVOCATE

exempt because it was truly no new title of possession. And in particular the Lord Ordinary and the consulted judges, Lords Moncreiff, Meadowbank, Medwyn, Jeffrey, Cockburn, Murray, and Ivory, refer to the case of *Turnbull* v. *Hay Newton* (1), which was a case of propulsion. The latter judges say: "It was impossible to hold that such a deed could have the effect of superseding an entail which it in express words confirmed; or that it could be considered as an original entail, when it merely put forward the fee expressly as it was held by the title of the only original entail." But the Lord Ordinary's view here would, I think, lead necessarily to the position that the deed of propulsion created a new entail, not inconsistent with the old but still a new entail, and, if so, it would, I think, have required registration, and that is inconsistent with *Turnbull* v. *Hay Newton*. (1) *Earl of Eglinton* v. *Montgomerie* (2) was affirmed in the House of Lords, and Lord Brougham puts the question (3) thus: "First, was the deed of 1774 a new and substantive and independent entail? or was it only one related and ancillary to the former entail of 1728 . . . . and having the mere operation of propelling the fee from the heir of entail in possession to the heir next called?" And then follows on p. 179 a passage which I think shews that Lord Brougham had precisely the same difficulties as to the real authority for a deed of propulsion as I have ventured to express. "It is to be observed, respecting such deeds as an heir of entail in possession makes merely to propel the fee, that they must very closely follow the tenor of the original and radical entail: because, unless they be so conceived as to be wholly identical with it, there is some difficulty in understanding how a forfeiture is to be avoided, supposing the original deed to be sufficiently fenced; nay, more, there seems some anomaly even then. For example, if Mrs. Lilias Montgomerie possessed under the deed of 1774, which she must have done if she propelled the fee to the next heir alioqui successurus, and converted her own fee, under the old entail, into a mere liferent, giving her son, before his time, a power to jointure his wife, one does not very well see how she could escape a

(1) 14 S. 1031. (2) 4 D. 425; affirmed 2 Bell's App. 149.
(3) 2 Bell's App. at p. 176.

forfeiture under the careful prohibition contained in the deeds of 1728 and 1757, against brooking, that is, enjoying or possessing, under any title except that of those deeds themselves. However, this difficulty must long since have been got over in the Scotch law, because the validity of propelling deeds has long been fully recognized."

On the whole matter, therefore, I come to the conclusion that the possession of an heir in virtue of a deed of propulsion is a possession of an estate of inheritance under the old entail, and that consequently a succession is established and succession duty becomes due. Its payment, however, as regards time is, I think, regulated by s. 15, because I think there is proper acceleration by the surrender of a prior interest. The Lord Ordinary thinks that s. 15 is inapplicable, his reason being, as explained by him, that "these words cover, and I think are intended alone to cover, not a fee, though it may be a fettered fee, but a charge upon the fee, as the interest of the tenant for life is a charge on the estate of a tenant in tail in England." Now, in the first place, I think the last sentence is inaccurate. As I understand it, the tenant for life holds a separate estate from the tenant in tail, and the one is not a burden on the other in the sense that a Scottish liferent is a burden on the fee. And, further, I fail entirely to see that the principle of the *Duke of Northumberland's Case* (1) is at all limited to the case of tenants for life. On the contrary, looking to the observations of Lord Davey in that case and the observations of Lord Selborne in *Lord Zetland's Case* (2), misapplied by the Lord Ordinary, I think that if in England a tenant in tail, who either could not bar or had not de facto barred the entail, surrendered his interest and allowed the next tenant in tail to come in, there would be a succession which would give rise to a claim for payment at the time fixed by s. 15, i.e., on the death of the surrendering tenant in tail.

I am therefore for recalling the interlocutor and giving judgment in favour of the Crown.

Lords M'Laren, Kinnear, and Pearson gave judgments to the same effect.

(1) [1905] A. C. 406. (2) 3 App. Cas. 505.

H. L. (Sc.) 1908 BUCHAN (EARL) v. LORD ADVOCATE.

1908. Nov. 9, 10. *Scott Dickson, D.F.*, and *Danckwerts, K.C.* (with them *William Chree*) (the first and last of the Scottish Bar), for the appellant. The decision of the First Division cannot be supported. The question was, Had the late Lord Buchan, the father, such an interest in the estate that on his death a succession took place in terms of the Succession Duty Act? "Succession" is not the act of succeeding. It is the property which is chargeable with duty under the Act which is termed a "succession." First, there was here no devolution by law under s. 2 of the Act. What did happen was that there was an inter vivos disposition in 1872 which carried along with it as part of the same transaction the right to disentail which was given effect to in 1875. There was not one item of clause 15 which applied to this case; there was no devolution by law. No beneficial interest was conveyed to Lord Cardross, and nothing was conferred upon him which was a succession in the sense of the Act. The First Division reversed the decision of the Lord Ordinary upon a mistaken view of what had been decided in some English cases, and notably in the *Duke of Northumberland's Case*. (1) In Scotland an heir of entail in possession has not a limited interest at all. He is full fiar of the estate subject always to the restrictions which are imposed by the terms of the entail. He cannot alter the order of succession. He cannot burden it with debt. He is in the position of being the full fiar of the estate so long as he lives; then on his death the next heir comes in by virtue of the destination in the original deed of entail, and he in his turn becomes full fiar of the estate. But while there is an heir of entail in possession, there is no one who has any interest in that estate at all other than a mere spes successionis. The law recognizes as a matter of settled practice that within the limits of the deed of entail the heir of entail in possession can lawfully propel the estate so that the next heir, the heir apparent, takes it: see *Craigie* v. *Halket Craigie* (2), *Lord Wharncliffe* (3), *Branden* (4), and Duff's Feudal Conveyancing, s. 11, p. 364. Here the result of the deed of 1872 was to oust the father, to divest him completely of the estate and vest it in

(1) [1905] A. C. 406.
(2) 19 Fac. Dec. 408.
(3) 24 Scot. Jur. 553.
(4) 9 Scots L. Times, 380.

the son, who had then all the privileges which an heir of entail could have. He could disentail, he could burden the estates, and if he disentailed he was then in the position of dealing with the estate in fee simple. When the father, Lord Buchan, died in 1898, the son had his deed of propulsion and had a right to disentail, and had disentailed and had held the lands as fee simple proprietor for twenty-three years. The relative positions of the heir of entail in possession and the heir apparent in Scotland differ from the position in England, where a tenant for life and a tenant in tail stand as having rights co-existing and contemporaneous with one another in the estates: see Lord Brougham in *Earl of Eglinton* v. *Montgomerie*. (1) Further, the spes successionis Lord Cardross had could have been got rid of in more ways than one. Assume the father had been guilty of a contravention of the entail, he himself and all the heirs of his body would have forfeited all right whatever, and the next stirpes would have taken, not from Lord Buchan, but by virtue of the deed of entail; secondly, the spes could have been terminated as here by a deed of propulsion. The Lord President founded on the dictum of Lord Halsbury L.C. in the *Duke of Northumberland's Case* (2) "that a succession within the Act once established, no manipulation of the parties afterwards can get rid of it." If that succession was established at the birth of Lord Cardross, then, whatever happened afterwards, although Lord Buchan disentailed and sold the estate, there would still be a claim for succession duty at some time or other; and who was to pay for it, Lord Buchan or the purchaser? Or could it be said that the succession was established by the propulsion, that was the very reverse of a succession, because that at once passed the property absolutely and entirely from Lord Buchan to Lord Cardross? The words of s. 2 of the Act were "Every devolution by law of any beneficial interest . . . . upon the death of any person." There was no devolution by law, because what took place was a devolution brought about by three sets of deeds, the result of which was that the whole entail which alone could give a devolution by law was swept away. Further, it must be a devolution by law of a beneficial interest "upon the death of

(1) 2 Bell's App. 149, 185. (2) [1905] A. C. 406, 409.

H. L. (Sc.) 1908

BUCHAN (EARL) v. LORD ADVOCATE.

any person." It was a transaction inter vivos by which Lord Buchan sold his interest in the estate to Lord Cardross in return for certain large and onerous considerations, raising money and agreeing to burden the fee simple estate with very large annuities. It would be more correct to say it was a sale of the property by Lord Buchan to Lord Cardross. Living the father, the son never had any title at all. As Lord Coke says, "without the death of the ancestor there can be no heir; the heir has no actual existence." A man who has an estate limited to him and his heirs in tail male has a more limited estate than an estate limited to a man and his heirs, but only in the sense that the class of heirs to whom the devolution upon death can go is restricted to a particular class. Until death, there is no title on the part of any one. The judgment for the respondent is put entirely upon s. 2 of the Act so far as the imposition of the duty is concerned. But there was here no devolution by law on "the death of any person." There was an inter vivos transaction onerous in its character, which was truly a purchase and sale. A man is entitled to an estate in fee simple, he is seised to himself and his heirs, his son will of course be the heir upon the death of the ancestor, and there cannot be any acceleration of the title to a succession wherever there is a devolution by law on death. In order that there may be an acceleration of a title there must be a pre-existing title to be accelerated. The analogy in Scotland to the tenant for life in England and the tenant in tail in remainder is the life renter and the tenant in tail who is the fiar. The position of the late Lord Buchan and the present Lord Buchan in Scotland in 1871 was exactly the same as the tenant in tail in possession in England and his eldest son. The decision of the Scottish Court, so far from assimilating the effect of the Succession Duty Act in England and in Scotland, would introduce a diversity. When you have in England a tenant in tail in possession and an eldest son, the eldest son has no succession at all pending the lifetime of his father, because he may die before his father. Moreover, his father may bar the estate tail, and he may never get anything. In Scotland it is exactly the same; pending the lifetime of the tenant in tail in possession the heir apparent has nothing, because he never may be heir. The

comparison should be taken between an English tenant in tail and his eldest son and Lord Buchan and his eldest son. Those two positions are exactly analogous. Now the heir apparent of an English tenant in tail has merely a spes successionis exactly the same as the Scottish heir apparent. There is nothing to accelerate. You cannot have an acceleration or an alienation of a succession unless there be a present estate in the person whose alleged succession is accelerated: Hanson's Death Duties, 3rd ed. p. 227, 5th ed. p. 490; Baron Cleasby in *Solicitor-General* v. *Law Reversionary Interest Society* (1); *Lord Wolverton* v. *Attorney-General* (2); *Lord Zetland's Case.* (3) There is no case where it has been suggested that there can be acceleration in the case of an estate which devolved by law upon death. The second section divides succession into two classes, those which arise by disposition and those which arise by devolution by law on death. The statute imposes a duty on a succession. Property may escape the tax for ever as chattels may escape legacy duty by the property always passing inter vivos: Bramwell B. in *In re Peyton.* (4) Baron Cleasby's reasoning in *Solicitor-General* v. *Law Reversionary Interest Society* (1) shews that succession is something which from its first existence is chargeable with duty; that cannot be the case as to an interest which does not come into existence at all until death. In the *Wolverton Case* (2) the late Lord Wolverton left the residue of his estate to his widow for life, and subject thereto to his right heirs. His right heirs turned out to be five co-heiresses. Of course the widow paid no legacy duty, because legacy and succession duty is not payable as between husband and wife, but the five co-heiresses paid legacy duty upon the residue. The present Lord Wolverton being insufficiently provided for, the parties made the following arrangement by deed inter vivos to make provision for the title. The late Lady Wolverton gave the present Lord Wolverton an annuity out of her life interest; that annuity came to an end on her death; the co-heiresses gave the same annuity to Lord Wolverton and the people following him in the title out of their absolute interest. On Lady Wolverton's

(1) (1873) L. R. 8 Ex. 233, 238.
(2) [1898] A. C. 535, 542.
(3) 3 App. Cas. 505.
(4) (1861) 7 H. & N. 265, 296.

H. L. (Sc.) 1908

BUCHAN (EARL) v. LORD ADVOCATE.

death the Crown claimed succession duty on the ground that Lord Wolverton had come into that second annuity upon the death of Lady Wolverton. The contention on the other side was that no succession duty was payable because the only succession was that which the co-heiresses had, and they having paid legacy duty on that, no succession duty was payable. This House, reversing the Divisional Court and the Court of Appeal, held that it was not a case of a new succession upon the death of Lady Wolverton, but a case of alienation of an existing succession which had paid duty. There Lord Halsbury said (1): "If it is a gift inter vivos deriving no force from the death of any one, I do not find any words in the section (s. 2) which make it chargeable with duty. If it were chargeable, a voluntary gift by any one or any part of it during his own life would equally make such gift chargeable with duty, and the whole nature of the legislation aimed at—succession upon death—would be altered into taxation upon transfer of any property by gifts inter vivos, and this to any extent of remoteness." A tenant in fee simple who grants his estate to his heir apparent makes a gift to him, but it is a gift inter vivos. There is no acceleration of title, because he had no title. And there is no diversity between the case of a tenant in fee simple and the case of a tenant in tail. In England you cannot transfer an estate tail so as to keep the estate tail going whether you transfer to the person who is your heir or not: *Gaskell and Walters' Contract.* (2) But in Scotland you can transfer the property during the lifetime of the tenant in tail in possession and his heir apparent, but it is a transaction inter vivos, it is not an acceleration of title. Under s. 15 there is no acceleration unless there is some succession to which the duty has attached before the acceleration. In England the tenant in tail would disentail and would then create a new entail in his heir apparent, but there would be no taxation in England in such a case, and exactly the same transaction in substance in Scotland ought not to give rise to taxation. The *Duke of Northumberland's Case* (3) has been misapprehended by the Court below. All this House there said was you cannot get rid of the charge of duty by alienating

(1) [1898] A. C. 535, 542. (2) [1906] 2 Ch. 1.
(3) [1905] A. C. 406, 414.

the succession. Incidentally there s. 15 was commented on, and this House approved of the result in *Solicitor-General* v. *Law Reversionary Interest Society* (1) and disapproved of the judgment of Sir George Jessel in *In re Cooper and Allen's Contract.* (2) The exact office of s. 15 was not to give the Crown a new duty; it is in favour of the taxpayer and postpones the duty, which would otherwise be payable at once; and that presupposes that at the time of acceleration there was a duty payable, and unless there was at the time of the acceleration a duty payable the section had no office to perform. "Succession" means property chargeable with duty, and s. 2 of the Act insists on the same distinction that until the devolution by law occurs no succession occurs, whereas per contra in the case of a disposition it recognizes that the succession is conferred directly the disposition becomes operative. Assuming nothing had been done by the late Lord Buchan or Lord Cardross, there would be a devolution by law when Lord Buchan died, but until the devolution there was no succession; nothing pre-existed the death of the late Lord Buchan which could create a succession, if that be so, and if there was no succession before that, how could the title to a succession which had no existence be accelerated? Lord Selborne takes in *Lord Zetland's Case* (3) the view that until and only by virtue of the devolution by law did the successor take anything in that case, and he took it from the tenant in tail, lately dead, his immediate predecessor: see also Lord Blackburn. (4) If an English tenant in tail disentailed and then conveyed the estates to a purchaser there would have been no duty payable. In that case the purchaser would have to pay no duty, and it made no difference that the conveyance was for a consideration or without consideration to the person who ultimately turned out to be the heir male. The law relating to revenue may be taken to be the same in England as in Scotland, yet if the Court below be right, it must be held that the duty attached in such a case.

Sir W. S. Robson, A.-G., and *A. Ure, S.-G. for Scotland* (with them *J. Austen-Cartmell* and *Robert Munro*) (the second and fourth of the Scottish Bar), for the respondents. The

(1) L. R. 8 Ex. 233.
(2) (1876) 4 Ch. D. 802.
(3) 3 App. Cas. 505, 518, 520, 521.
(4) Ibid. at p. 524.

H. L. (Sc.) 1908 BUCHAN (EARL) v. LORD ADVOCATE.

validity of a deed of propulsion is beyond all dispute, but it must be considered what is precisely the effect of a deed of propulsion, and, secondly, what was meant by "acceleration." The Crown contend there was created here a succession by the deed of entail which takes effect earlier than the date which would have been its due date by virtue of the deed of propulsion. The deed of entail sets out the class from whom the heir is to be selected by law, but in Scottish law there is a proceeding, not known to the English law of entail, by which the existing estates may be extinguished, so that the person called in England to be heir of entail comes into possession before the death. It is only in Scotland that there seems to be a very clear case of acceleration to which s. 15 can be applied. The deed of propulsion cannot be treated as if it were creating some new line or series of limitations. That would clearly be in contravention of the original deed of entail; the deed of propulsion is therefore consistent with the original entail. It does not supersede it nor vary it; all it does is to accelerate the operation of some of the limitations prescribed by the entail. Lord Cardross comes in as if Lord Buchan had died. The transaction has exactly the same effect in law as the physical death of Lord Buchan. Lord Buchan is, according to the language of the Lord President quoted from *Craigie* v. *Halket Craigie* (1), civiliter mortuus. What is that but an acceleration within s. 15? It is the only way by which succession which is limited to take effect on death can be accelerated. There is here a disposition which brings about the acceleration, not a disposition which brings about the succession. All that the deed of propulsion does is to remove pre-existing estates, so the tax is good here under both branches of s. 2. That section is intended to cover every case of succession. There is first a disposition by the deed of entail, next a disposition which extinguishes pre-existing interests, and then a devolution by law which creates a succession under s. 15. The two systems of English and Scottish law come quite easily under the language popularly used in the two sections of the Act. The question really comes to be, is s. 15 satisfied? It is submitted that it is. The words are "where the title to any succession shall be

(1) 19 Fac. Dec. 408.

accelerated." The title to the succession is the title to the property which is the subject-matter of the entail. On the death of Lord Buchan there would have come a title. Was not that a succession?

[LORD LOREBURN L.C. Take the case of a tenant for life and the remainderman who are alone interested in an estate, who concur and sell it for 50,000*l.* to some one else in 1875 and then the next day spend the money, and the purchaser has paid the full value. On the death of the tenant for life is succession duty payable?]

If the entail had been constituted so as to name the remainderman and thereby to create a then existing succession, the liability to duty would attach although not due until the death of the tenant for life. The property may remain forty or fifty years subject to the liability to pay succession duty. The *Duke of Northumberland's Case* (1) shews that the duty cannot be avoided. In that case there was a resettlement, but it did not affect the principle laid down by Lord Halsbury, namely, that if once the liability to duty attaches you may sell the property that is equivalent to transferring the succession, but you cannot thereby extinguish the liability to succession duty. If, instead of it being an heir named, you have an heir who succeeds as heir of the body by devolution by law, in that case you have no succession created until the heir is born, and his expectancy is certain. But if you create, as in the case of the Duke of Northumberland, a distinct succession, namely, from the Duke of Northumberland to Lord Percy, you cannot get rid of the liability to duty by transferring the property which is the subject-matter of the succession.

Lord Halsbury put it in a sentence, "that a succession within the Act once established, no manipulation of the parties afterwards can get rid of it." In the *Duke of Northumberland's Case* (1) there was obviously an attempt to break the succession and treat the property as being within the free disposal of the parties, but that was held to be bad. The resettlement did not seem to make any difference because it was on the original succession. *Solicitor-General* v. *Law Reversionary*

(1) [1905] A. C. 406, 409.

H. L. (Sc.) 1908

BUCHAN (EARL) v. LORD ADVOCATE.

Interest Society (1) was a case of the alienation of a succession, merely the substitution of one man for the natural successor, and then the alienee became the successor. The decision was good, but the dicta by which the decision was in part supported have been questioned by Lord Macnaghten in the *Duke of Northumberland's Case.* (2) Here the succession was created in 1872, when the deed of propulsion extinguished the prior interests and thereby accelerated the succession of the next heir. By s. 15 the duty is postponed to another date. It cannot be doubted there was a succession here when one comes to look at the words of the deed which Lord Buchan and Lord Cardross executed.

The deed of propulsion has the effect of clearing existing estates out of Lord Cardross's way—the prior life estate—so that by the law of entail he comes into possession. Is there any difference between an English entail and a Scottish entail? You have the English life tenant and the Scottish fiar. The English life estate has only a life estate, and there is a remainder limited, say, to the eldest son—the eldest son has a remainder which is a valid estate vested in him. Under the Scottish system of entail the father, Lord Buchan, has the whole fee subject to fetters, the fetters being that he cannot alienate so as to destroy the right of Lord Cardross. Lord Cardross is said to have a "hope of succession," he has a "hope" of living, but if he lives his succession is absolutely certain. So, although in legal form there may be a great deal of difference between Lord Cardross's "hope" and the English remainderman's estate for market value or for insurance purposes, they are practically identical; that is to say, Lord Cardross has, if he lives, a certainty of succession. So has the English remainderman; therefore the words of the section apply easily to both laws. The appellant speaks of the Scottish expectant heir as being a person who has a mere speculative possibility, as if he were merely an heir presumptive and not an heir apparent. But he has an absolute valuable interest which he may dispose of in some way or other, and which is therefore appropriately called an estate. If that was the character of the

(1) L. R. 8 Ex. 233. (2) [1905] A. C. 406, at p. 411.

estate held by Lord Cardross, how can it be denied that this propulsion was an acceleration? The succession was established in 1872. It did not matter what happened afterwards. The parties ought when they subsequently disentailed, if they wished to sell the land, to make provision for the liability that attached after 1872, for they could not get rid of the liability. What Lord Buchan and Lord Cardross were anxious to do was to alter the order of succession; they were not desirous of deleting from their entail the prohibition against alienation. In fact they were desirous of getting rid of the prohibition in the entail against contracting debts. Had that prohibition not been in the original entail there would have been no disentail. Their real object was to enable the younger man to borrow on the security of the estate, thus violating one of the three cardinal prohibitions in the entail. In 1872 you find Lord Buchan the heir of entail in possession under the deed of 1664. In 1875 you find Lord Cardross heir of entail in possession under the very same deed of 1664, but rid of its fetters. It contained the order of succession and all the prohibitions, and nothing is altered except that the fetters are struck off, and on the death of Lord Buchan we still find Lord Cardross heir of entail in possession under the deed of 1664, and he is heir of entail in possession to the present day, no doubt at liberty, if he pleases, to sell the estates or to alter the succession; but he did neither, and after 1875, unless he did some further act, the original deed of entail bound him. Lord Buchan could not alienate nor disentail, he could do absolutely nothing to defeat the right of Lord Cardross in 1872. The heir apparent under the entail had not a mere spes successionis; he had numerous rights which an heir under a simple destination has not: *Lord Advocate* v. *Earl of Glasgow*. (1) In a Scottish entail and in an English entail the tenant for life cannot defeat the right of the remainderman so far as the taxing statutes are concerned; accordingly a deed of propulsion by an heir of entail in possession under a strict entail who cannot alienate the property is equivalent to merely a surrender of his right and a pushing forward of the right to the man who comes in next, but who necessarily takes not under the

(1) (1875) 2 R. 317, 328.

H. L. (Sc.) 1908 BUCHAN (EARL) v. LORD ADVOCATE.

deed of propulsion, but under the entail, because the heir in possession surrenders his right and renounces it. He can do no more than that: Lord Kinloch in *Viscount Dupplin* v. *Hay* (1) and argument in *Craigie* v. *Halket Craigie*. (2) The Crown adopt almost without qualification the judgment of Lord Kinnear (3), but the word "must" ought to be read for the word "may" in the sentence "As I understand the act any beneficial interest in property which may open to a person on the death of another person either by disposition or by devolution of law creates a succession in the sense of the second section of the statute." Unaltered, that statement of law would hold good where you had a simple destination with an heir holding simply a spes successionis. It is quite clear that this was a case of acceleration of title. The English Courts have applied s. 15 as we ask this House to do: *Ex parte Sitwell*. (4)

Scott Dickson, D.F., in reply.

The House took time for consideration.

1908. Dec. 3. LORD LOREBURN L.C. My Lords, this is one of those cases in which a conclusion seems clear as soon as the real significance of the facts is appreciated. We have to consider whether or not duty is payable on a succession under the Act of 1853, an Act which is so framed as to cover the system of disposition both of England and Scotland. The language of the Act is framed for that purpose, and must be construed, as has been pointed out by authority, so as to meet the substance of each case that arises.

Looking at the substance, and avoiding technical terms, what happened was as follows. Lord Buchan was entitled to enjoy these properties during his life. Whether he held in fee, though under fetters, or for an estate for life as understood in England, seems to me to signify nothing. His eldest son, Lord Cardross, was entitled to enjoy them after his death, and others also were, or would be, entitled to succeed Lord Cardross in due course, according to the entail. In these circumstances Lord Buchan

(1) 10 M. 89, 93.
(2) 19 Fac. Dec. 408, 409.
(3) (1907) S. C. 849, at p. 866.
(4) (1888) 21 Q. B. D. 466.

during his lifetime, in 1872, transferred, by a process admittedly valid under Scottish law, his interest to Lord Cardross, for the purpose of making provision by the raising of money to meet debts and incumbrances. Part of the family arrangement was that when Lord Cardross reached the age of twenty-five he should disentail these properties. This he did in 1875, with the concurrence of Lord Buchan. Thenceforth Lord Cardross enjoyed the properties. If he did not alter the destination then they would descend under the original entail to the persons destined by the entail. He did not alienate, if that matters. In 1898 Lord Buchan died, and the Crown claimed that succession duty was payable on that death. In my opinion the Crown is right in that contention.

Had there been no transfer in 1872, beyond question there would have been duty payable on a succession when Lord Buchan died. And it seems to me that s. 15 of the Act of 1853 provides in unmistakable terms that the duty shall be paid notwithstanding the transfer. The title of Lord Cardross was accelerated by the surrender or extinction of Lord Buchan's prior interest, and the duty became payable at the same time and in the same manner as if no acceleration had taken place. As to the disentailing in 1875, it does not affect the case at all. In fact Lord Cardross continued to hold under the entail, though he held free from its fetters.

I do not refer to the discussion by the learned judges in the First Division of the origin and meaning of propulsion in the law of Scotland. The doctrines there laid down have not been disputed at the bar; and whatever view had prevailed on that subject, it would not have altered my opinion as to the construction and effect of the Act of 1853. To my mind the principles acted upon by this House in the Duke of Northumberland's case, in 1905, would furnish authority for this case, if authority were needed.

LORD ROBERTSON. My Lords, in my opinion the appellant is liable under s. 15 of the Act of 1853. To me it is clear that he had a "title" to this "succession," capable of being "accelerated"; that this title was accelerated by the deed of propulsion;

H. L. (Sc.) 1908

BUCHAN (EARL) v. LORD ADVOCATE.

Lord Robertson.

and that by that deed his father extinguished his own "prior interest."

The media upon which I proceed are few and simple; and the case admits of brief discussion. I say this, because the very elaborate examination of the history of deeds of propulsion contained in the judgments of the First Division has given to the controversy an appearance of complexity which does not belong to it. It is perfectly clear law that deeds of propulsion are within the powers of heirs of entail, and in particular that this deed of propulsion was legal. As to its effect, the deed tells its own story, so far as is necessary to support the judgment under review. On its face, it vests the appellant with the fee of the estate, subject to the conditions of the entail. That it could not have done otherwise is of course perfectly true; but this does not advance the present argument.

Well, now, what was the character of the right which the appellant held before he got the deed of propulsion? It is a serious understatement of his rights to say that he had a mere spes successionis. He was the eldest son of his father and the next heir designated by the original deed of entail. He had, therefore, a jus crediti to enforce the conditions of the entail; and the lands could not be disentailed without his consent, or without his interest being valued and paid for. His title, however, was, in its nature, one to take the estate at some time in the future. It seems to me, therefore, that he had such a title as falls within the terms of s. 15 and was capable of being accelerated. That it was accelerated by the deed of propulsion is certain, for by it he got the estate, more than thirty years before the death of his father. So far as the father's interest in the estate was concerned the statutory word "extinction" describes the result with precise accuracy, and the word "interest," while aptly applied to inferior rights, is sufficiently comprehensive to include the rights of an heir of entail in possession.

It was urged that the disentail which followed and the onerous conditions which preceded the deed of propulsion alter the result. Now, so far as the disentail is concerned, it did not affect the destination in the old entail; that destination stood

unaltered and was the governing destination at Lord Buchan's death; and the appellant, but for the deed of propulsion, would have made up his title under that destination.

So far as the terms of the family arrangement go, I do not see how they affect the result. The essential fact is that, in the sequel, the appellant got the estate. I do not see that it would be better or worse if the arrangement had been made for the benefit of the appellant, or of both father and son.

LORD COLLINS concurred.

Ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Lords' Journals, December 3, 1908.

Agents for appellant: *Neish, Howell & Haldane, for John C. Brodie & Sons, Edinburgh.*

Agent for respondent: *Sir Francis C. Gore, Inland Revenue, England, for Philip J. Hamilton Grierson, Inland Revenue, Scotland.*

[PRIVY COUNCIL.]

J. C.* 1908 *July* 7, 8; *Oct.* 16.

LA COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS . . . . . } APPELLANTS;

AND

CONTINENTAL HEAT AND LIGHT COMPANY AND ANOTHER . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Dominion Act 60 & 61 *Vict. c.* 72 — *Quebec Act* 4 *Edw.* 7, *c.* 84, *s.* 3 — *Dominion overrides Provincial Legislation.*

Where a given field of legislation is within the competence both of the Dominion and provincial Legislatures, and both have legislated, the Dominion enactment must prevail:—

Held, accordingly, that the respondent company, which under Dominion Act 60 & 61 Vict. c. 72 was empowered to supply, sell, and dispose of gas and electricity, with other powers, could not be restrained from operating thereunder at the suit of the appellants, who under later Quebec statutes had exclusive power of so operating in the locality chosen by the respondents.

APPEAL from a judgment of the above-mentioned Court (May 4, 1907) affirming a judgment of the Superior Court at Arthabaska (November 13, 1906) and dismissing the appellants' action and petition for injunction.

The appellants were incorporated by Quebec statutes 2 Edw. 7, c. 76, and 4 Edw. 7, c. 84, and were granted the privilege of producing and selling electricity as power, heat, and light within a radius of thirty miles from the village of Disraeli, in Quebec. Sect. 3 of the later Act is set out in their Lordships' judgment. The respondents were incorporated under a Dominion Act, 60 & 61 Vict. c. 72, ss. 7 and 8 of which defined their powers, which included that of manufacturing, supplying, selling, and disposing of gas and electricity. Sect. 8 empowered them, with the consent of the municipal council or other authority having jurisdiction over any highway or public place, to enter thereon

* *Present:* LORD ROBERTSON, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

for the purpose of making the necessary constructions and suitable electrical contrivances. Both companies erected buildings and installed plant and machinery to produce and distribute electrical power within the said thirty miles radius.

On an action by the appellants for damages and an injunction the Superior Court held that 4 Edw. 7, c. 84, s. 3, is a clause contained in an Act of a local and private nature, which by art. 9 of the Civil Code could not affect the rights of third parties not therein specially mentioned, the same provision being contained in the Provincial Interpretation Act (Quebec Act 49 & 50 Vict. c. 95), s. 14; that the respondent company's charter was in existence when the charter of the appellants was enacted and amended; that the clause relied upon did not grant a privilege, but, if anything, made a restriction upon charters of other companies, and it is not mentioned therein that the privileges granted to the respondent company by Dominion Act 60 & 61 Vict. c. 72 are affected by that Act, nor is that Act affected by 4 Edw. 7, c. 84, nor is the respondent company excluded from the right of making and selling electricity within the territory in question.

H. T. Taschereau C.J. delivered the judgment of the majority of the Appellate Court (Blanchet J. dissenting). They dismissed the appeal on the ground that there was no error in the judgment of the Court below, and held in substance that a federal charter confers not only legal existence on the company it incorporates, but gives it inherent rights and powers of a general kind which cannot be subsequently affected, limited, or changed by provincial legislation, and the federal charter being intra vires the Parliament of Canada, it was not possible to say that it could be affected by the appellants' charter afterwards obtained. Even if the respondent company's charter had been a provincial instead of a federal one, he did not think that it could be claimed that its general powers were affected by such a clause as that contained in 4 Edw. 7, c. 84, s. 3, which was an Act of a purely private nature and did not mention the respondent company. He relied on the decision in the case of *Toronto Corporation* v. *Bell Telephone Co. of Canada.* (1)

(1) [1905] A. C. 52.

J. C. 1908 — LA COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS v. CONTINENTAL HEAT AND LIGHT COMPANY.

Blanchet J. considered that the Act in question should be considered to be a private Act. The prohibition contained in it affected not only electric companies, but all covered by 2 Edw. 7, c. 76, and as it was impossible to describe them, it became necessary to say in general language that they should not operate in the territory designated in the Act without the consent of the appellants and the other companies named in the Act. The two cases of *Citizens' Insurance Co.* v. *Parsons* (1) and *Colonial Building, &c. Association* v. *Attorney-General of Quebec* (2) established that an incorporated company can only exercise its powers in each province subject to the laws in force in that province. As the province of Quebec did not possess coal mines, its water powers were of great importance and formed an integral part of the immovable property of the province, and consequently fell under the exclusive control of the Legislature of the province, which, in granting charters for the exploitation of these water powers, had the indubitable right to prescribe conditions which would favour their rapid development. He also considered that the right of the respondent company to exercise its powers upon the highways with the consent of the municipalities was not in the nature of a vested right, and that the municipal authorities' power to consent being derived from the Legislature, it could be taken away from them, and that, in substance, the effect of the statute in question was to do this.

Sir R. Finlay, K.C., and *Panneton*, for the appellants, contended that this judgment should be reversed and that the judgment of Blanchet J. was right. The object of the Dominion statute was to incorporate the respondent company and clothe it with the necessary powers to carry on its business. It was neither its intention nor its effect, according to its true construction, to confer on the respondent company any right to disregard the special privileges of the appellants. Those privileges had been granted by competent legislative authority acting within its local jurisdiction. The power to incorporate a company for provincial objects is specifically given to the provincial Legislature by British

(1) (1881) 7 App. Cas. 96, 113. (2) (1883) 9 App. Cas. 157.

J. C.
1908
LA COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS v. CONTINENTAL HEAT AND LIGHT COMPANY.

North America Act, 1867, s. 92, sub-s. 11, and cannot be overborne by a Dominion Act passed subsequently to the provincial Act. Under such circumstances the Dominion legislation must be subject to existing rights under provincial legislation and should be so construed as not to interfere with them unless their owners consented. According to the true construction of 4 Edw. 7, c. 84, the appellants' consent was necessary to legalize the acts of the respondents. They had not, however, obtained that consent, and there was nothing in the Dominion statute which absolved them from so doing or rendered such consent unnecessary to the validity of their proceedings. They referred to British North America Act, 1867, s. 91, sub-s. 29, and s. 92; *Citizens' Insurance Co.* v. *Parsons* (1), where it was held that the local law must prevail as to the conditions on which insurance business should be carried on; *Colonial Building, &c. Association* v. *Attorney-General of Quebec* (2); *Hull Electric Co.* v. *Ottawa Electric Co.* (3); *Toronto Corporation* v. *Bell Telephone Co. of Canada* (4), where the objects of the company were very different from those now in question; *Grand Trunk Railway of Canada* v. *Attorney-General of Canada*. (5) The Dominion has the power to incorporate for all purposes with the exception of those which are specially confided to the province.

Lafleur, K.C., and *MacDougall, K.C.*, for the respondents, were not heard.

On July 8 their Lordships agreed to report to His Majesty that the appeal should be dismissed.

1908
Oct. 16.

The reasons for the report were delivered by

Sir Arthur Wilson. A statute, 60 & 61 Vict. c. 72, of the Parliament of Canada incorporated the respondent company and enacted that (s. 7) it might manufacture, supply, sell, and dispose of gas and electricity, with other powers.

Subsequent provincial statutes of Quebec incorporated the appellant company and granted it the exclusive privilege of

(1) 7 App. Cas. 96, 113.
(2) 9 App. Cas. 157.
(3) [1902] A. C. 237.
(4) [1905] A. C. 52.
(3) [1907] A. C. 65.

J. C. 1908

LA COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS v. CONTINENTAL HEAT AND LIGHT COMPANY.

producing and selling electricity within a radius of thirty miles from the village of Disraeli, in the province of Quebec.

The statute further enacted that "No company shall exercise any privileges, franchises, or rights of a like nature to those conferred upon the St. Francis Water Power Company by the Act 2 Edward VII., chapter 76, in the territory designated in the said Act without first obtaining the consent of the said St. Francis Water Power Company, and that of the companies mentioned in the following clause."

The respondents took steps to act under their charter by establishing works within thirty miles from Disraeli. The appellants applied for an injunction to restrain them from so doing. The Courts in Canada refused the injunction, and against that refusal the present appeal has been brought.

The contention on behalf of the appellant company was that the only effect of the Canadian Act was to authorize the respondent company to carry out the contemplated operations in the sense that its doing so would not be ultra vires of the company, but that the legality of the company's action in any province must be dependent on the law of that province.

This contention seems to their Lordships to be in conflict with several decisions of this Board. Those decisions have established that where, as here, a given field of legislation is within the competence both of the Parliament of Canada and of the provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict, as they clearly are in the present case.

For these reasons their Lordships on July 8 last agreed humbly to advise His Majesty that the appeal should be dismissed, and directed the appellants to pay the costs of it.

Solicitors for appellants: *Stibbard, Gibson & Co.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

CHIPPENDALL . . . . . APPELLANT;

AND

WILLIAM LAIDLEY & CO., LIMITED . . RESPONDENTS.

J. C.*
1908
July 21;
Oct. 29.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Crown Lands Alienation Act, 1861, *s.* 21—*Lands Act Amendment Act*, 1875, *s.* 8—*Conditional Purchaser cannot convert his Purchase after he has fulfilled his Conditions—Grant in Fee Simple.*

According to the true construction of New South Wales Crown Lands Alienation Act, 1861, its amendments, and regulations made thereunder the words "conditional purchaser" in s. 21 mean a purchaser who purchased originally on certain conditions which have not been fulfilled. A purchaser who has fulfilled the conditions of his purchase is under s. 8 of the amending Act of 1875 the "rightful owner," and his purchase has ceased to be conditional although he has not obtained a grant in fee simple:—

Held, that the option given by Regulation 40, made under the said Acts, of converting a conditional purchase into a conditional purchase for mining purposes ceases on the fulfilment of all conditions and cannot be reserved indefinitely by delay in obtaining the grant in fee simple.

APPEAL from a judgment of the Supreme Court (August 13, 1907) making absolute a rule nisi for a mandamus directed to the appellant, as Crown Lands Agent for the district of Newcastle, ordering him to receive an application by the respondents dated July 13, 1906, to convert a conditional purchase in that district into a conditional purchase for purposes of mining other than gold mining in order that the same might be dealt with according to law. The appellant, acting on instructions from the Minister for Lands, refused to receive the application.

The judgment is reported in New South Wales State Reports, 1907, vol. vii., p. 538. The circumstances under which the appellant refused to receive the said application are stated in the judgment of their Lordships.

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

J. C.
1908
CHIPPENDALL
v.
WILLIAM LAIDLEY & CO.

Under the Crown Lands Alienation Act, 1861 (25 Vict. No. 1), s. 13, Crown lands were to be open for conditional sale by selection, and any person might apply for the same at the price of 20*s*. per acre with a deposit of 25 per cent. of the purchase-money, and if no other similar application and deposit were made he was to be declared the conditional purchaser at the said price; conflicting applications were to be decided by lot. Sect. 18 provided that at the expiration of three years from the date of the conditional purchase, or within three months thereafter, the balance of the purchase-money was to be tendered together with a declaration that, inter alia, (1.) improvements had been made on the said land and (2.) that there had been bona fide residence on the land as therein mentioned, and upon the Minister for Lands being satisfied by such declaration of the facts aforesaid the Colonial Treasurer was to receive and acknowledge the remaining purchase-money, and a grant of the fee simple, but with the reservation of any minerals which the land might contain, was to be made to the then rightful owner; but it was provided that by payment of interest at 5 per cent. per annum on the balance of the purchase-money to the said Treasurer the payment of such balance might be postponed from year to year. Sect. 19 provided that Crown lands might be conditionally selected for the purposes of mining (other than gold mining) under s. 13 aforesaid, but the price was to be 40*s*. an acre, and the only conditions required were certain expenditure on mining operations, and upon satisfaction thereof a grant in fee simple was to be made without reservation of minerals (other than gold).

The Act of 1861 was amended in 1875 and 1880 by 39 Vict. No. 13 and 43 Vict. No. 29, and Regulations duly made thereunder contained the following:—

Chapter II. R. 40. Any conditional purchaser of Crown lands under clause 13 of the Act of 1861, or his lawful alienee, should be at liberty to convert his purchase into a conditional purchase for mining purposes by application to the Land Agent of the district and payment of 5*s*. per acre, being the difference between the rates of deposit applicable to the two cases.

The Crown Lands Act of 1884 (48 Vict. No. 18) provided by

s. 7 that all grants of land were to contain a reservation of all minerals therein; but it was provided that the right of any holder of a conditional purchase made under s. 13 of the Act of 1861 to convert such purchase into a conditional purchase for mining purposes in accordance with any Regulations in force for the time being under the said Act might be exercised subject to the terms and conditions contained in such Regulations as if the Act of 1884 had not been passed.

Regulations made under this Act and its amendments provided—

No. 115. The holder of any conditional purchase made under s. 13 of the Act of 1861 might apply to the Land Agent on Form 37 for the conversion thereof into a conditional purchase for mining purposes, and with any such application a sum of 5*s*. per acre of the conditional purchase was to be paid to the Land Agent.

The respondents, as transferees of a conditional purchase, paid on March 26, 1906, to the Colonial Treasurer a sum in excess of the balance of unpaid purchase-money. On July 13 they applied for a refund of the said sum as inadvertently paid, which was refused, and applied also to convert their conditional purchase into a mineral conditional purchase. Later a grant in fee simple was duly executed, but the respondents did not take it up, and obtained the rule nisi hereinbefore mentioned.

Sir R. Finlay, K.C., and *Wise* (*K.C.* of New South Wales), for the appellant, the Crown Lands Agent for the district of Newcastle, contended that the rule absolute should be set aside. They contended that the respondents at the date of their application to convert their conditional purchase into a conditional purchase for mining purposes were not "the holders of a conditional purchase." All conditions had been fulfilled and the respondents had acquired an absolute right to an estate in fee, and were none the less absolute and rightful owners of the lands so acquired because they had refused to take up the grant in fee simple to which they were entitled. It was contended that the regulations which authorize the conversion sought by the respondents do not apply to a case in which all conditions have been fulfilled

J. C. 1908 — CHIPPENDALL v. WILLIAM LAIDLEY & CO.

and the right to a grant in fee simple has become absolute. The option given only enures while the conditions are in process of being fulfilled and ceases when the title is absolute, and cannot be kept alive by refusing to accept the final grant of the legal title. They referred to *Blackwood* v. *London Chartered Bank of Australia* (1) and the various Acts in question, namely, 25 Vict. No. 1, s. 3; 39 Vict. No. 13, s. 8; 43 Vict. c. 29, s. 10; c. 2, r. 40, of the Regulations; 48 Vict. c. 18, ss. 2, 7; and to *In re MacWhittingham* (2); *In re Baldwin* (3); *Abbott* v. *Minister for Lands* (4); *In re Clift* (5); Crown Lands Act, 1895, s. 31; *Rose* v. *Watson* (6); *Shaw* v. *Foster* (7); *Chisholm* v. *Macauley* (8); *Drinkwater* v. *Arthur* (9); *In re Rogers and Broughton*. (10) The cases are collected in Canaway's Crown Lands Acts, pp. 28, 29 (ed. 1891).

The case for the respondents would not have been improved if the balance of purchase-money had been either unpaid or refunded, for in either case the conditional purchase would have been liable to forfeiture for non-fulfilment of conditions.

Levett, K.C., and *Alfred Adams*, for the respondents, contended that upon the true construction of the Acts the holder of land which has been acquired by conditional purchase continues to be a holder of a conditional purchase for the purposes of the right of conversion into a mineral conditional purchase notwithstanding that all conditions as to residence and improvements and full payment of the purchase-money have been fulfilled. The Court below was in any event right in holding that until the Crown grant was made and accepted the purchase did not cease to be conditional. Sects. 21 and 22 of the Act of 1861 were referred to, and it was contended that until the grant in fee was completed the purchase was not absolute or other than conditional within the meaning of the Acts. The respondents were not bound to accept the Crown grant of the fee simple and had

(1) (1874) L. R. 5 P. C. 92.
(2) (1891) 4 Land Court Cases 22.
(3) (1891) 12 N. S. W. L. R. 128.
(4) [1895] A. C. 425.
(5) (1895) 16 N. S. W. L. R. 155.
(6) (1864) 10 H. L. C. 672, 678, 683, 684.
(7) (1872) L. R. 5 H. L. 321, 338.
(8) (1868) 7 Sup. Ct. Rep. N. S. W. 312.
(9) (1871) 10 Sup. Ct. Rep. N. S. W. 193, 213.
(10) (1888) 10 N. S. W. L. R. 179.

never requested or consented to its execution, and consequently they retained the position of conditional purchasers with the option of conversion. They referred to the various Acts and Regulations already cited and to *In re Clift* (1); *Shepherd* v. *Halloran* (2); 1903 Act No. 15, s. 19.

It was the intention of the Legislature that a conditional purchaser should have a right to convert, and that he should not be deprived of it until, by the issue of a grant in fee, he became the absolute legal owner. The grant makes the dividing point of time at which the purchase ceases to be conditional within the contemplation of the Land Acts, and it was not intended to substitute some other point of time in the gradual process of completing the holder's title at which he would lose the character of a conditional purchaser.

Sir R. Finlay, K.C., replied.

1908
Oct. 29.

The following judgment was delivered by

Lord Atkinson. This is an appeal from a judgment of the Supreme Court of New South Wales, dated August 13, 1907, making absolute a rule nisi for a mandamus directed to the appellant, as Crown Lands Agent for the land district of Newcastle, ordering him to receive an application by the respondents, dated July 13, 1906, to convert a conditional purchase into a conditional purchase for purposes of mining other than gold mining, in order that the same might be dealt with according to law. The appellant, acting on instructions from the Minister for Lands, refused to receive the application.

There is no dispute as to the facts.

It is admitted that one William Johnstone in the year 1879 had, under s. 13 of the Crown Lands Alienation Act of 1861, tendered a written application to the proper officer for the conditional purchase of the lands, 200 acres in extent, the subject-matter of this suit, at the price of 20*s.* per acre; had paid a deposit of 5*s.* per acre; had subsequently paid the residue of the purchase-money; and had on July 28, 1884, obtained the certificate required by s. 18 of that Act, certifying that he had resided upon the selection and had made improvements on it.

(1) 16 N. S. W. L. R. 155. (2) (1904) 4 N. S. W. State Rep. 542.

J. C. 1908 CHIPPENDALL v. WILLIAM LAIDLEY & CO.

In 1899 he transferred all his interest in the lands so selected to the present respondents, who on July 25, 1901, became the registered owners of the lands so conditionally purchased in the books of the Land Department, and on March 26, 1906, paid to the Colonial Treasurer a sum more than sufficient to discharge what remained due in respect of the purchase-money. The respondents have thus performed every condition attaching to the purchase which they were bound to perform. They have not, however, obtained, or applied for, a grant of these lands in fee by the Crown, and the question for decision is whether they can now apply to have the purchase converted into a purchase for mining purposes under s. 19 of the same statute. In order to decide that question it is necessary to consider the provisions of several of the statutes and regulations now or heretofore in force in New South Wales dealing with the subject of the conditional purchase of land, and ultimately to determine whether a purchaser, who has performed all the conditions of his purchase, can be held to be the holder of a "conditional purchase" within the meaning of these statutes.

By s. 13 of the above-mentioned statute provision is made for the conditional sale by selection of Crown lands not within a proclaimed goldfield, for the purposes of the improvement of them and settlement upon them, at the purchase price of 20*s*. per acre. The selector must make an application to the Land Agent for the district for the conditional purchase of these lands, not being less than forty or more than 320 acres in extent; must pay a deposit of 25 per cent. of the purchase-money, 5*s*. per acre; and (by s. 18) must reside on the lands continuously for twelve months from the commencement of his occupation, must make certain improvements on the land, and after three years from the date of his conditional purchase may, on satisfying the Minister named in the Act that these conditions have been fulfilled, obtain a conveyance from the Crown of the land in fee simple, all minerals being reserved to the Crown. Provision is made in the same section (18) for the deferring from year to year of the payment of the balance of the purchase-money by the annual payment of interest thereon at the rate of 5 per cent. per annum, on peril, however, of forfeiture of the

purchase to His Majesty if the requirements of the section be not observed.

By s. 8 of the Lands Acts Amendment Act, 1875, provision is made for the payment of the balance of the purchase-money with 5 per cent. interest thereon by annual instalments of 1*s.* per acre. This is in lieu of the provision above mentioned for the deferred payment of the purchase-money. If the lands proposed to be purchased are situate in a proclaimed goldfield, then the provision is added that, should gold be found in them, the purchase may be forfeited on certain conditions, but if the land sought to be purchased has been selected for mining purposes other than gold mining, then by s. 19 of the Act of 1861 the price is doubled, 40*s.* per acre being charged instead of 20*s.* The deposit is doubled, no period of residence is required, nor need any improvements be effected, but instead of improvements an outlay of (on an average) 2*l.* per acre must be made, and, on proof that these conditions have been performed and the balance of the purchase-money paid, a grant of the lands without any reservation of minerals must, as in the other cases, be made to the purchaser.

Neither in the Act of 1861 nor in that of 1875 is any provision whatever made for the conversion of a selection for residential or settlement purposes made under s. 13 of the former Act into a selection for mining purposes under s. 19, nor for a purchase, conditional or completed, made under the one into a like purchase made under the other. This is all the more remarkable, as by ss. 27 and 28 of the Act of 1875 provision is made for the conversion of mineral leases into mineral conditional purchases.

Moreover, by s. 18 of the Act of 1861, as well as by s. 8 of the Act of 1875, the conditional purchaser who has fulfilled all the conditions, and is in a position, as the respondents are in this case, to require a grant to be made to him, is styled the "rightful owner."

Much argument was addressed to their Lordships as to the rights of the purchaser in such a position The statute sets that at rest: he is the "rightful owner"—needing, indeed, the formal grant to clothe him with the legal estate in the lands, but on all equitable principles as much the owner before the grant is made

J. C. 1908 CHIPPENDALL v. WILLIAM LAIDLEY & Co.

as after it has been made. And it does not appear to their Lordships that there can be any reason in the nature of things why the person who is thus rightful owner should be permitted to convert his purchase before the grant of the lands is made to him, but not afterwards. In either case he would only acquire, in addition to the lands of which he was already the owner, the minerals under them. Where a grant had already been made an additional deed would have to be executed, that is all. In both cases the additional purchase-money would have to be paid, and the outlay of 2*l.* an acre on an average certified.

Mr. Levett, for the respondents, relied much on ss. 21 and 22 of the Act of 1861 to shew the kind of regeneration worked upon a conditional purchaser by the execution of a grant of the lands to him, and the different light in which such a purchaser is regarded by the statute before the grant and after it, he being in the latter case treated as an owner in fee, and not in the former. But s. 22 is not confined to converted conditional purchasers. It applies to all owners in fee, whether they acquired the fee, as did the plaintiff in *Abbott* v. *Minister for Lands* (1), by purchase under s. 25 of the Act of 1861 or otherwise.

Sect. 30 of the Act of 1861 and s. 47 of the Act of 1875, however, empower the Governor to make regulations. In exercise of that power, Regulations, dated August 28, 1875, were issued by him. By one of these (variously numbered 40 and 54) it is provided that a conditional purchaser under ss. 13, 21, or 22 of the Act of 1861 may apply on a particular form to the Lands Agent of the district on payment to him of 5*s.* an acre, "being the difference between the rate of deposit on the respective selections, to have his purchase so converted. Provided that at the time of such proposed conversion the original selection has not been forfeited or liable to be forfeited for any breach of the conditions thereof." The proviso could scarcely apply to a purchase all the conditions of which had been performed, since it obviously has in view purchases which have been, or still may be, forfeited for breach of condition.

It is equally strange that the Regulations should not contain

(1) [1895] A. C. 425.

any provision whatever for giving the purchaser in such a case as the present credit for the sums other than the deposit theretofore paid in discharge of the purchase-money. The purchaser under s. 13, who, like the respondents in this case, has paid the whole of the purchase-money, is treated in precisely the same way as one who has paid a deposit and nothing more. For instance, in the present case the respondents, who have paid 200*l.*, are required to pay 50*l.* as an additional deposit, just as if they had paid the original deposit of 50*l.* and nothing more. It is strange that this should be so, if it was ever intended that the liberty to convert should have been given after all the purchase-money had been paid. It leads strongly to the conclusion that the option to convert was to be exercised before anything beyond the deposit had been paid, that is, before three years from the date of the purchase had elapsed. For the provision for the suspension of the payment of the balance of the purchase-money under s. 18 of the Act of 1861 and s. 8 of the Act of 1875 only comes into operation after the lapse of that period. It may possibly be that a purchaser who, by the performance of all the conditions, had become "rightful owner" of the lands, entitled to demand and to receive his grant, would, for the sake of acquiring the minerals under them, jeopardize all he had already securely obtained. Such a hazard, however, does not appear to be within the purview of these Regulations.

By s. 2 of the Crown Lands Act of 1884 the above-mentioned Act of 1861 is (with others) repealed, but not so as to "prejudice or affect any proceeding, matter, or thing lawfully done, or commenced, or contracted to be done, under the authority of any enactment or regulation hereby repealed," and saving, subject to the express provisions of the Act, all rights accrued and obligations imposed by virtue of the repealed Acts. By s. 37, however, the procedure is modified this far, that the grant of the lands purchased is, after all the conditions have been performed, only made on the application of the purchaser and on payment by him of stamp duty and a deed fee, but neither in this nor in any of the statutes subsequent in date to which their Lordships have been referred is any provision whatever made for the conversion of lands selected for residence, cultivation, or pasture into a

J. C. 1908 CHIPPENDALL v. WILLIAM LAIDLEY & Co.

selection for the purposes of mining. Regulations were, however, on June 3, 1895, published to carry into effect the provisions not only of the Crown Lands Act of 1884, but also of the Crown Lands Act of 1889 and the Crown Lands Act of 1895. Nos. 115 to 118 (both inclusive) of these Regulations deal with the conversion of conditional purchases made under ss. 13, 21, or 22 of the Act of 1861 into conditional purchases for mining purposes. No. 115 is practically identical with No. 40 (or 54) of the Regulations of 1875, save that the words "the holder of a conditional purchase" are used in the former instead of the words "any conditional purchaser" used in the latter. Regulation 116 purports to deal to some extent with the financial anomalies already referred to, and provides that the holder of any conditional purchase converted as aforesaid shall not, during a period of three years succeeding such conversion, be required to pay any interest or instalment of purchase-money, but at the expiration of such period, or within three months thereafter, he shall pay for each current year interest at the rate of 5 per cent. if he has not previously paid instalments, or, if otherwise, instalments at the rate of 2*s.* per acre. No. 117 provides that the holder of any conditional purchase for mining purposes may bring his purchase under the regulation for payment by instalments. And Regulation 118 provides that "the holder of any conditional purchase converted as aforesaid shall, at the end of the third year from the date of the application to convert the same, make a declaration in the Form 38 that a sum of 2*l.* per acre has been expended in mining operations thereon other than for gold."

The provisions of these several Regulations strengthen rather than weaken the inference to be drawn from those of the earlier Regulations of 1875, namely, that the application to convert is to be made while the proceedings for purchase are in progress, and not after they have been completed by performance of all the conditions.

While the respondents admit that, by obtaining the grant of this land from the Crown, their power to convert their purchase into a purchase for mining is destroyed, yet they insist that they can, by abstaining from applying for their grant, reserve their

option to convert for an indefinite time. That construction of the statute would, in effect, disable the Crown from disposing of the minerals during the purchaser's pleasure, since the right to select for mining given under s. 19 of the Act of 1861, or to convert under the Regulations, seems absolute. It is reasonable enough that the Crown should be restrained from alienating the minerals for the period of three years during which the purchaser under s. 13 is making improvements upon his lands and becoming acquainted with its possibilities, but it is utterly unreasonable that their hands should be thus tied indefinitely at the will and pleasure of the purchaser.

The words used in the Act of 1884 and Regulation 115 are not "conditional purchaser," but "holder of a conditional purchase." If by those words it is intended to describe a person who purchased originally on certain conditions, then the description will be applicable to him whether he obtained a grant or not. On the other hand, if the words mean a person who still holds the land he purchased on some condition which remains unfulfilled, they are entirely inapplicable to a purchaser who has fulfilled all these conditions. The payment of the stamp and the deed fee and the application for the conveyance cannot be treated as conditions, inasmuch as these are things which a purchaser is obliged to do under the most absolute form of contract of purchase.

The Australian authorities to which their Lordships have been referred shew that the Australian Courts have, in construing s. 21 of the Act of 1861, held that the words "conditional purchaser" mean a purchaser who purchased originally on certain conditions which have not been fulfilled, and not a purchaser who has fulfilled those conditions. In their Lordships' opinion the words "holder of a conditional purchase," as used in s. 7 of the Act of 1884 and in No. 115 of the above-mentioned Regulations, equally mean a person who holds all the lands he purchased on conditions still unfulfilled, and not a purchaser who holds his lands free from conditions, since all the conditions originally attaching to the purchase have been fulfilled. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, the judgment

J. C. 1908 CHIPPENDALL v. WILLIAM LAIDLEY & CO.

appealed from reversed, and the rule nisi for a mandamus discharged with costs.

The respondents must pay the costs of the appeal.

Solicitors for appellant: *Light & Fulton.*
Solicitors for respondents: *Crawford, Chester & Slade.*

[PRIVY COUNCIL.]

J. C.* 1908 *Nov.* 25; *Dec.* 15.

GILBERT HORDERN AND ANOTHER . . . . APPELLANTS;

AND

SAMUEL HORDERN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Codicil—Construction—Period of Distribution.

Where a testator gave an annuity to his widow till death or remarriage and created other fixed charges on his estate in favour of all his children during minority and of his daughters after attaining majority and directed that on his youngest child attaining majority his two sons if alive would become absolutely and indefeasibly entitled to the residue of his estate share and share alike:—

Held, that the period of distribution thus plainly indicated was not postponed by a codicil which directed that in case all his children died without issue his brother should take the whole residue and gave the trustee a discretionary power at any time to enhance the widow's annuity. As regards the discretion it appeared to have been exercised, and the widow appeared to have consented that no further enhancement should be made.

APPEAL from a decretal order of the Supreme Court (September 20, 1907) declaring that the respondent as trustee of the will and codicil in suit was not at the present time bound to divide the testator's residuary estate equally between his sons the two appellants. The order was made in a suit commenced on May 9, 1907, by originating summons, in which the respondent was plaintiff and the testator's widow and the two appellants were

* *Present:* LORD ATKINSON, LORD ROBERTSON, and LORD COLLINS.

defendants. The report of the proceedings in the Court below is in 7 New South Wales State Reports, 846.

The provisions of the will and codicil are sufficiently set out in their Lordships' judgment.

The testator died on September 17, 1886, leaving five children, all of whom were living on May 9, 1907, the youngest having attained her majority a few days previously.

By an order of the said Court (November 30, 1888) it was declared that the respondent would be justified in making an allowance not exceeding 3000*l.* per annum out of the income of the estate of the testator to his widow Mary Elizabeth Hordern during her life and widowhood until the youngest of her children should attain twenty-one years of age in addition to the annuities to which the children were entitled under the said will, and by a further order dated March 19, 1899, the respondent was authorized to pay to the said Mary Elizabeth Hordern during her life and widowhood and until the youngest child of the testator attained her majority a further annual sum of 1000*l.*

In the suit the direction of the Court was sought, inter alia, whether the respondent as trustee of the will and codicil was entitled to pay to the widow any sum in addition to the annuity of 200*l.* bequeathed to her by the will notwithstanding that the youngest of the children of the testator had attained twenty-one years, and, if so, whether he was justified in continuing to pay to her during her life or widowhood the sum of 4000*l.* per annum in addition to the said annuity; and whether after setting aside a sum sufficient to answer the respective annuities bequeathed to the widow and the daughters of the testator and such additional sums to the widow as aforesaid he ought to divide the balance of the residue of the estate of the testator equally between the appellants.

At the hearing the widow by her counsel agreed with the appellants to give up her right and chances under the will and codicil as from the time when the youngest child of the testator attained the age of twenty-one years, that is to say, April 25, 1907, conditionally on it being held by the Court that as between the respondent and the appellants the time for distribution of the estate had arrived.

J. C.
1908
HORDERN
v.
HORDERN.

By decretal order (September 20, 1907) the Chief Judge in Equity declared, inter alia, that the trustee was not "at the present time" bound to divide the balance of the said residue between the appellants. This decision was based on the ground that there was no indication in either will or codicil that the event upon which the gift over to the respondent as the testator's brother was to take effect, namely, the death of all the testator's children without issue, was to happen before the youngest child came of age.

Buckmaster, K.C., and *W. R. Sheldon*, for the appellants, contended that the respondent as trustee was bound to divide the residue at once after making provision for the daughters' and widow's annuities. By the true construction of the will and codicil the appellants took on the youngest child coming of age estates indefeasibly vested in interest. The plain direction was to divide at that date and at that date only, which was inconsistent either with the date being postponed or with any divesting of the estate so divided. The testator's plainly expressed intention was that the whole residue of his estate should at that date be divided equally between his sons living and indefeasibly enjoyed by them thenceforth. The gift over to the respondent was contingent upon all the children having died without issue before the period of distribution arrived or the actual division had taken place. The object was to avoid an intestacy only in that event. If the sons had died without issue before the stated period, and the daughters or any of them had survived, the gift over would not have taken effect and intestacy as to the residue would have resulted. The respondent's title only accrued on the happening of a contingency which was strictly defined. Reference was made to *O'Mahoney* v. *Burdett* (1), in which the four canons of construction laid down in *Edwards* v. *Edwards* (2) are discussed, especially with regard to the period to which an executory devise will be referred. Delay in the vesting of an absolute gift is not favoured by the Courts, and it is not permissible to extend the period of a contingent gift beyond what is required by the

(1) (1874) L. R. 7 H. L. 388, 393. (2) (1852) 15 Beav. 357.

ordinary and natural meaning of the words used. See also *Whiting* v. *Force*. (1)

Upjohn, *K.C.*, and *T. R. Colquhoun Dill*, for the respondent, contended that the judgment appealed from was right. The true construction of the will and codicil is that the gift to the respondent takes effect in the event of all the testator's children dying without leaving lawful issue. This event might happen at any time, or in the alternative during the lifetime of the testator's widow, or in the further alternative during her widowhood. The period of distribution, therefore, could not arrive at least until the widow died or remarried. The codicil introduces by this gift over to the respondent and by the discretionary power given to enhance the widow's annuity provisions which conflict with the will and to some extent supersede it. The discretionary power, for instance, is exercisable by the trustee during the widow's whole life or widowhood and necessarily postpones the period of distribution, which would have the effect of abolishing the exercise of the trustee's discretion. If the will directed that the coming of age of the youngest child should be the period of distribution, the codicil according to its true construction revoked that direction and postponed it till at least the death or remarriage of the widow, and in either case the Court below was right in holding that the respondent was not at the present time bound to distribute. Reference was made to *In re Schnadhorst, Sandkupe* v. *Schnadhorst*. (2)

Buckmaster, *K.C.*, in reply.

The judgment of their Lordships was delivered by

LORD ATKINSON. This appeal has been taken from so much of a decretal order dated September 20, 1907, of the Chief Judge in Equity of the Supreme Court of New South Wales as declares that the respondent, as trustee of the will, dated October 8, 1878, of one Anthony Hordern, deceased, late of George Street, Sydney, in that Colony, was not, under the terms of that will and the codicil thereto of even date, in the events which have happened, then bound (after providing for the

(1) (1840) 2 Beav. 571. (2) [1902] 2 Ch. 234.

J. C. 1908 HORDERN v. HORDERN.

annuities to the testator's daughters in the will mentioned) to divide the residue of the testator's estate between his two sons Albert Gilbert and Anthony, the appellants.

Thus the only question for decision turns upon the construction of two clauses in the will, as modified by the codicil.

The testator died on September 17, 1886, leaving him surviving his wife, Mary Elizabeth Hordern, and five children, two sons and three daughters, all of whom are still alive. The youngest of these children, Freda Elsa Hordern, attained the age of twenty-one years on April 25, 1907, some seventeen days before the institution of this apparently somewhat friendly suit.

The testator by his will devised and bequeathed to his executor and trustee all the property, real and personal, of which he should die possessed, in trust to convert it into money, to pay thereout his debts and funeral and testamentary expenses, and to invest the residue in certain securities therein named, with power to vary the same from time to time, and out of the annual income of these investments he directed his trustee to pay to his wife Mary Elizabeth the sum of 200*l.* for and during her natural life, provided she should so long continue his widow. The will then proceeds thus: "And shall pay to each of my children the sum of one hundred pounds a year to be applied towards their maintenance and education until the youngest of my children shall attain the age of twenty-one years and upon the youngest of my children attaining the age of twenty-one years I direct my said trustee (subject to such payments to my wife as aforesaid) to settle the sum of two hundred and eight pounds a year upon each of my daughters for life [and] to divide all the residue of my said trust moneys stocks funds and other securities and effects then in his hands belonging to my estate (after the payment of all expenses incurred) equally between my sons then living share and share alike."

It was not, and indeed could not be, disputed that, according to the clear intention of the testator as expressed in this clause, two things would occur on the attainment of the majority of his youngest child—(1.) his two sons, if alive, would become absolutely and indefeasibly entitled to the residue of his estate, share and

share alike; (2.) the obligation imposed on his executor and trustee to divide and pay over to them their respective shares of this residue would become operative. The will, however, left three contingencies unprovided for: (1.) The annuity of 200*l.* per annum might prove to be an inadequate provision for his widow; (2.) his two sons might, before his youngest daughter attained twenty-one years of age, die without leaving issue, when there would be an intestacy as to the residue, and the same would be divisible amongst his wife and daughters as his next of kin; and (3.) all his daughters might die without issue before the same period, the majority of the youngest, had arrived.

In their Lordships' opinion the testator by his codicil endeavoured to provide for the first and last of these contingencies, and these alone, leaving the law to provide for the second. He accordingly authorized his trustee, at any time or times, in his discretion, to pay to his wife a further sum in addition to the annuity bequeathed to her, and then declared as follows: "In the event of all my children dying without leaving lawful issue, then all my estate and effects I devise and bequeath unto my brother Samuel Hordern his heirs executors administrators and assigns."

In neither the will nor the codicil is there any express bequest of the residue, or any part of it, to any of the testator's daughters. In the event of the second contingency arising, since there would have been a complete conversion of his real estate into money, one-third of his residue would go to his widow, and two-thirds to his other next of kin. The testator was apparently content that this should be so, as he made no provision against it, but, if the contention of the respondent be well founded, the testator's wife and children would not become absolutely and indefeasibly entitled to their distributive shares of his assets coming to them under the Statute of Distribution till the death of the survivor of the three daughters, inasmuch as the provision in the codicil is that, in the event of all his children dying without leaving lawful issue, all his residuary estate is to pass to the respondent—a somewhat strange and unnatural result to have been intended by him.

The argument addressed to their Lordships on the respondent's

J. C. 1908 HORDERN v. HORDERN.

behalf is that there is such an antagonism between the provisions of the will and the codicil that they cannot stand together, and that the former must therefore be taken to have been pro tanto revoked by the latter. Such an argument appears to their Lordships to be fallacious. There is, in truth, no conflict between the provisions of these two instruments. The provisions of the codicil are supplementary to and in harmony with those of the will. By the codicil it is not sought to substitute new provisions for those contained in the will, but merely to deal with two contingencies left untouched by the will. The bequest to the sons remains one of the dominant dispositions of the will. It is not revoked, cut down, or made contingent by the codicil. Their Lordships are therefore of opinion that on the true construction of these instruments the gift of the residue to the testator's two sons became on April 25, 1907 (the day when their youngest sister came of age), absolute and indefeasible. This is in accordance with the decision in *O'Mahoney* v. *Burdett* (1), inasmuch as there is, in their Lordships' opinion, on the face of the will a clear expression of the testator's intention that the bequest of the residue should so operate and have effect.

Since the death of the testator the trustee, with the sanction of the Court, has increased the widow's allowance to 4000*l.* per annum. In exercise of the power given him by the will he may, as it seems right to him in his discretion, increase or diminish this amount; and it is urged that the existence of this power necessarily postpones the distribution of the residue till the widow's death. But the answer is that she has agreed with her sons that a certain sum of money shall be set apart out of the residue (which is ample) to provide for her annuity of 4000*l.* per annum, and that the balance of the fund shall (subject to the payment of the annuities to her daughters being provided for) be divided between her sons. This arrangement, which the parties to it are quite competent to enter into, meets the difficulty, and the respondent is not only justified in carrying it out, but, their Lordships think, is bound to do so.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that the order below

(1) L. R. 7 H. L. 388.

should be varied by striking out the words "not at the present time," but otherwise confirmed.

The costs of all parties as between solicitor and client will be paid out of the estate.

J. C. 1908 HORDERN v. HORDERN.

Solicitors for appellants: *Burton, Yeates & Hart.*
Solicitors for respondent: *White & Leonard.*

[HOUSE OF LORDS.]

S. PEARSON & SON, LIMITED . . . . . APPELLANTS;
AND
DUBLIN AND SOUTH EASTERN RAILWAY COMPANY . . . . . RESPONDENTS.

H. L. (I.) 1909 *Feb.* 25.

Railway Company—Extension of Powers—Application of Assets—Construction of Extension Line—Creditors—Separate Undertaking.

An existing railway company incorporated by statute was empowered by a later special Act to make extension railways, the railways and works and the land and property acquired for the extension to form a separate undertaking with separate capital, and as between the general and the separate undertaking the expenses of maintaining and working the separate undertaking to be paid out of the revenue of the separate undertaking. There being no provision either in the special Act or in the contract for constructing the extension to limit the liability of the company for the expenses of construction to the assets of the separate undertaking:—

Held by Lord Loreburn L.C. and Lord Macnaghten (Lord Ashbourne dissenting), that the contractors were entitled to be paid out of the general undertaking the sums due to them for the construction.

The decisions of the King's Bench Division and the Court of Appeal in Ireland (not reported) reversed.

In re Ogilvie, (1871) L. R. 7 Ch. 174, approved.

THE respondents were constituted the Dublin, Wicklow, and Wexford Railway Company by an Act of 1846 (9 & 10 Vict. c. ccviii.).

By an Act of 1897 (60 & 61 Vict. c. cci.) power was given them to construct railway lines from their terminus at New Ross to Waterford, these railways to be constructed, maintained, and

H. L. (I.) 1909

S. PEARSON & SON, LIMITED v. DUBLIN AND SOUTH EASTERN RAILWAY.

worked as a separate undertaking, the railways and works and all lands and property to be acquired for the purposes of the railways to form a separate undertaking with separate share or stock and loan capital and otherwise as provided by the Act of 1897; as between the general undertaking of the company and the separate undertaking the expenses of maintaining and working the separate undertaking to be borne and paid out of the revenue of the separate undertaking. The provisions of the Act as to the raising of capital are stated in the judgments of Lord Ashbourne and Lord Macnaghten.

The appellants contracted with the respondents to construct the extension lines for specified sums of money, nothing being said in the contract to confine the liability of the respondents to pay for the construction out of the assets of the separate undertaking.

The appellants having brought an action against the respondents (under their present statutory name of the Dublin and South Eastern Railway Company) for the sums due, the King's Bench Division in Ireland (the Lord Chief Baron, Johnson and Boyd JJ.) gave judgment for the sum of 23,836*l.*, with a limitation that the judgment should operate against and be levied only out of the separate undertaking. This decision was affirmed by the Court of Appeal in Ireland (the Lord Chancellor, Fitz-Gibbon and Holmes L.JJ.), Holmes L.J. doubting. Hence this appeal by the contractors. The arguments urged on each side appear from the judgments in this House.

1908. Dec. 1, 3. *Danckwerts, K.C.*, and *Stewart-Smith, K.C.* (*James H. Campbell, K.C.*, and *E. A. Collins*, both of the Irish Bar, with them), for the appellants.

Ronan, K.C. (of the Irish Bar), and *Sir C. A. Cripps, K.C.* (*Walter B. Clode* with them), for the respondents.

Danckwerts, K.C., in reply.

The House took time for consideration.

1909. Feb. 25. LORD LOREBURN L.C. My Lords, notwithstanding the great weight which must naturally attach to the

judgment now under review before your Lordships, I feel bound to act upon the clear opinion I have formed.

The defendant company was authorized, at its own desire and for its own advantage, by a private Act of Parliament to construct an extension line of railway. Every care was taken in that Act to provide that this line should be a separate undertaking, separate from the general undertaking of the defendant company. The capital is to be separate, whether it be shares or stock or loan capital. Dividends are to be paid only out of the profits of the separate undertaking or from the proceeds of guarantees specially allowed by the Act, and limited, so far as they may be given by the company, to the sum of 4000*l.* a year. "As between the general undertaking of the company and the separate undertaking the expenses of maintaining and working the separate undertaking shall be borne and paid out of the revenue of the separate undertaking."

I do not propose to analyse at length the provisions of the private Act. They have been most fully and carefully scrutinized in the Courts below. I have no doubt it was both intended and expected that the cost of building the extension line should be met out of the separate assets of that line. But no section expressly says that, if those assets do not suffice, the general assets of the company are not to satisfy a debt incurred in such building.

My Lords, in this condition of things the defendant company made a contract with the plaintiffs that they should construct this extension line, and there is now due to the plaintiffs on that contract a sum of 23,836*l.* There is not a word in that contract limiting this company's liability to any particular assets. But the argument is that, by reason of the provisions of the private Act to which I have alluded, the Court must infer that. This argument has prevailed, and the judgment before your Lordships is limited accordingly—a convenient way of settling the controversy between the parties.

Now I cannot help thinking that, in the fascinating pursuit of doubtful inferences as to what might be read into or spelt out of various sections in this Act, certain broad legal conclusions have been lost to view. Here is an unqualified covenant by the

H. L. (I.) 1909

S. PEARSON & SON, LIMITED v. DUBLIN AND SOUTH EASTERN RAILWAY.

Lord Loreburn L.C.

company to pay this money. There is only one company, though it has two (or for what I know more than two) undertakings. It cannot be pretended that the covenant is ultra vires. Until the private Act of 1897 I suppose it would have been so. When that Act in terms authorized the company to construct this line it also authorized the company necessarily to make a contract for the construction and to pay for it. In other words, the assets of the company, which prior to 1897 could not be applicable to make good this contract for construction, because it would have been foreign to the then existing powers of the company, became so applicable after 1897, because it was no longer foreign to the powers of the company; unless, of course, the Act contained something to prevent it. When a corporation makes a lawful contract, are not its general assets ordinarily available to satisfy a judgment in damages for breach of it?

That much is not and cannot be denied. But the respondents maintain that the sections of the private Act setting up this undertaking as separate forbid the company from applying any but the separate assets to answer a liability relating to it. This is the point which they must establish if they are to succeed. In plain business terms it means that the company could without qualification covenant to pay contractors for great and costly works, and then refuse to pay the bill except out of a part of their business which is admittedly insolvent. If this be a sound view, then the company can equally give the same answer to a demand for wages or coal accounts in respect of the undertaking. I do not for a moment suppose that this company would desire to use such a licence; but it would really amount to a licence to employ unwarned workmen, tradesmen, and contractors without paying them, or to break passengers' necks with impunity, on this particular extension line, while comfortably distributing in dividends the profits of that part of the business which is remunerative. For no distinction can be drawn in this respect between actions in contract and those in tort, or between contracts for construction and those for maintenance or working. Is it possible that Parliament can have sanctioned all this without saying so in terms explicit enough to warn those who might deal with such a company of the danger they were running?

The sections of the private Act from which these consequences are supposed to ensue were searched microscopically in the argument before your Lordships for minute and subtle indications that the common duty of a debtor to pay his debts out of his assets had been, in this case, superseded by statute. Nothing further was found than that the undertaking in question is a separate undertaking, which no one seeks to deny. Nothing was found relating to the payment of ordinary creditors, or, indeed, could possibly be found. For these sections (which are of a familiar kind in private legislation) have nothing to do with general creditors, but refer exclusively to internal and domestic relations between different classes of shareholders and mortgagees or debenture-holders, whose rights among themselves or between themselves and the company are therein specifically declared. Accordingly, if I do not follow the Court of Appeal and the Divisional Court in their analysis of the Act, my omission does not proceed from any want of respect for their high authority. I am met on the threshold by the objection, to my mind insuperable, that these sections are concerned with an entirely different subject-matter.

I respectfully advise your Lordships that this appeal should be allowed and an unrestricted judgment entered for the plaintiffs with costs here and below.

Lord Ashbourne. This case comes before your Lordships on appeal from the judgment of the Court of Appeal in Ireland, affirming the judgment of the King's Bench Division in Ireland, presided over by the Lord Chief Baron, and, with deference to my noble and learned friend on the woolsack, in my opinion their judgments were correct and should be affirmed.

The question in this appeal is one of law, namely, whether the appellants, as creditors, are entitled to an ordinary general judgment for a sum of money against the respondents, enforceable against any of the assets of the respondents, or only to a judgment against the assets and property of the respondents in the separate undertaking, the extension railways under the Act of 1897. There is no dispute as to the facts.

The question turns on the construction of the Act of 1897,

H. L. (I.) 1909

S. PEARSON & SON, LIMITED v. DUBLIN AND SOUTH EASTERN RAILWAY.

Lord Ashbourne.

which must, of course, be read as a whole, and which has been subjected to a masterly analysis by the Lord Chief Baron, thus affording great assistance to all who have to consider the case.

The respondents were originally constituted by an Act of 1846, and at the time of the passing of the Act of 1897 their capital and assets were appropriated by the Act of 1846 and amending Acts to the purposes of those Acts, and they had no power to expend any of their capital or assets upon the construction of the railways authorized by the Act of 1897.

Their authority to construct the new railway must be found entirely in the Act of 1897, whose preamble is important and worthy of attention. It is manifest that before the Act of 1897 the assets of the respondents could not be applied to the purposes of the appellants' contract. Is there anything in the Act of 1897 to subject the assets of their general undertaking to such a liability?

The whole scheme of the Act of 1897 is to make the railway it authorized a separate undertaking in its construction, working, and maintenance. The respondents were given certain specified powers to utilize the assets of their "general undertaking," and a clearly expressed and limited authority to raise and advance money from the "general undertaking" for the construction of the new separate undertaking. But the appellants argue that as the new line was authorized by the Act of 1897, this involved a power to incur liability for its construction, the common law right of the creditor not being interfered with. It is urged that there is no express limitation of liability in the Act of 1897, and that there is nothing in its provisions from which such limitation can or should be implied. On the other hand, the respondents insist that the whole Act means and distinctly conveys that the separate undertaking was alone to be liable, and by necessary implication prohibits recourse to the assets of "the general undertaking."

It is thus necessary to examine the sections of the Act very closely, but I shall only refer to some of the sections which I regard as specially significant, being satisfied to adopt the detailed examination of the Lord Chief Baron.

The appellants have no right to object to being held bound by

the Act of 1897, for their agreement to construct expressly recites that the respondents were "acting under the authority vested in them by that Act." The contractors were only employed to execute works under the authority of the Act; any other works would have been ultra vires, and the respondents themselves had no other warrant for making such a contract. A railway company could only apply its funds as provided by statute, and could not lawfully contract to apply them to any other purpose.

The new line was to be constructed as a separate undertaking (s. 42), and a subsequent section (s. 47) expressly provides that mortgages and debenture stocks of each company should be kept entirely distinct and should not comprise or affect each other. Sect. 52 gives power to the respondents to raise capital for the construction of the separate undertaking, but only with the authority of three-fourths of their shareholders. It is impossible to read these and other sections of the Act without recognizing that jealous care is taken throughout to safeguard the shareholders of the respondents from liability for charges and liabilities that were not plainly expressed. What was the good of requiring the consent of three-fourths of the shareholders for an advance under s. 52 if without any consent or any meeting "the general undertaking" could be made liable for—it might be—a ruinous and indefinite liability? The appellants are creditors under their agreement, but have they a right to claim a more favoured position than creditors who claim under mortgages and debentures, and who are kept rigidly to their separate security under the Act? The appellants in substance contend that, notwithstanding the express and stern limitation on the right to resort to the funds of "the general undertaking," we should spell out or imply a vast liability on their funds unqualified and unstinted, without safeguard or meeting.

I cannot find anything in the Act of 1897 which could so widen or enlarge the powers of the Act of 1846 and amending Acts as would authorize the application of the funds of the "general undertaking" to pay for the construction of the new line. The appellants must be held to have been thoroughly acquainted with the Act of 1897 at the date of the agreement,

H. L. (I.) 1909

S. PEARSON & SON, LIMITED v. DUBLIN AND SOUTH EASTERN RAILWAY.

Lord Ashbourne.

and the respondents stated on its face that they were acting "under the authority vested in them under that Act." With this knowledge they may, as often happens in like cases, have been quite satisfied to look exclusively to the new separate undertaking for payment.

Sect. 57, which authorizes the company with the special consent already mentioned to guarantee dividends to a certain amount, almost treats the general undertaking not only as a separate but as a distinct company, as the Waterford and Limerick actually was. It shews the positive limitation of amount as being keenly in contemplation. Sect. 61 is also important, regulating as it does the application of capital. It is plain that no part of the capital of the new line could be applied in payment of any liability of the "general undertaking." Is it very unreasonable to ask why should any of the capital of the "general undertaking" be applied in payment of the liabilities of the new separate undertaking? The amending Act of 1900 also supports the construction I have placed on the Act of 1897.

In my opinion the order appealed from is right and should be affirmed, and the appeal dismissed with costs.

LORD MACNAGHTEN. My Lords, I agree with the Lord Chancellor entirely.

The case is of importance because the decision of the Court of Appeal in Ireland seems to be in direct conflict with a decision of the Court of Appeal in England on the construction of an Act of Parliament for all practical purposes identical in its scheme and in its terms with the Act which your Lordships are now called upon to construe.

There was a railway company in England under a special Act and carrying on its original undertaking; an extension of its undertaking was authorized. The Act authorizing the extension declared that the extension railway should for financial purposes form a separate undertaking, and that the capital and new shares created under the powers of the Act should constitute a separate capital. A creditor of the company, whose debt was incurred before the extension Act was passed, seized some surplus land which had been bought for the extension railway.

The company objected. They submitted that they were trustees of the land for the extension shareholders, and they contended that such land could not be taken in order to satisfy a debt contracted exclusively for the purposes of the original undertaking. There was some show of plausibility about that contention. But it was rejected by Wickens V.-C., and on appeal by James L.J. sitting as the Court of Appeal in Chancery under the Act of 1867 (30 & 31 Vict. c. 64). "It may be," said the learned Lord Justice, "that as between the extension shareholders and the original shareholders the lands now in question are the property of the former and that they have rights against the latter if such property is applied in payment of this debt; but the fact that for the financial purposes of the company the extension line is treated as a separate undertaking does not make these lands cease to be property of the company liable to be taken by any bona fide creditor of theirs."

That was *Ogilvie's Case* (1), a case of the highest authority, for no more competent judges on such a question could be found than the two learned judges by whom it was decided in two Courts. *Ogilvie's Case* was in 1871. So far as I know, it has never been doubted or questioned. It must have governed the rights of many parties in many cases where the original undertaking of a railway company has been extended and the extension is declared to be a separate undertaking with a separate capital and a separate body of shareholders. One of the learned Lords Justices in the Irish Court of Appeal ignored *Ogilvie's Case* altogether. Another was constrained to admit that it could not stand with the decision he was about to pronounce. The Lord Chancellor of Ireland holds that in *Ogilvie's Case* "the ideal separate entity," as his Lordship describes the separate undertaking there, "was only for a limited purpose." He was referring, I presume, to the expression "for financial purposes" which occurs in the enactment then under consideration, and which had been commented upon in the Court below, as if there could have been any other conceivable purpose for which the scheme of making the extension railway a separate undertaking could have been devised.

(1) L. R. 7 Ch. 174.

H. L. (I.)
1909
S. PEARSON & SON, LIMITED v. DUBLIN AND SOUTH EASTERN RAILWAY.
Lord Macnaghten.

It would, I think, create much confusion in the affairs of many companies if your Lordships were compelled to affirm a judgment overruling a decision so well settled and so long established as the decision in *Ogilvie's Case*.

With the utmost respect to my noble and learned friend opposite and the learned judges with whom he agrees, I think that no substantial distinction can be drawn between the present case and *Ogilvie's Case*. I think the decision in *Ogilvie's Case* was perfectly right, and I think this case must be determined on the same grounds.

But this case seems to me to be even clearer and stronger in favour of the claimant. In *Ogilvie's Case* the creditor enforced his claim against property which was not in existence when the debt was incurred, and to which he could not possibly have looked. Here the debt was created by reason of the company doing the very thing they were told to do, and the creditor seeks to enforce his claim against property which the company possessed when the liability was incurred.

Let me invite your Lordships' attention to the position of the company and the duties which they undertook under the sanction of Parliament. They came to Parliament with the assent, of course, of their shareholders, and asked Parliament to authorize them to construct a line of railway from their terminus at New Ross to Waterford. From this extension they anticipated, no doubt, an increase of traffic on their existing line by connecting it with Waterford and bringing it into communication with the general system of railways in the south of Ireland. That would be an indirect benefit. But they also proposed to secure a direct benefit by taking all the profits of the extension line in every half-year, after paying the shareholders of the separate undertaking a non-cumulative dividend of 5 per cent. and recouping moneys paid under certain guarantees as specified in the Act. Their anticipations may have been too sanguine, but on paper, at any rate, the expectation of this deferred dividend must have been a condition not unattractive to the shareholders in the general undertaking. Then they asked for powers to raise a capital for the separate undertaking. All these proposals were sanctioned by Parliament. And so Parliament authorized the

company to construct the extension railway and to take the land required for the purpose.

Did this authority empower the directors to pledge the credit of the company in order to launch the undertaking? Why not, if they had confidence in their estimates and in the success of the undertaking? The company assumed the position of promoters and sole managers of the extension line as a separate undertaking, while care was taken to protect the general undertaking by obtaining power to raise a capital which, according to their estimates at the time, would be sufficient for all the requirements of the separate undertaking. If there is a deficiency now, there must have been either mismanagement or miscalculation somewhere. But why should the contractors suffer for that? The contractors, I think, were entitled to rely on the express words of this Act. A power to construct implies a power to pay for construction. A power to take land implies a power to pay for the lands which may be taken. If these plain words are to be cut down, it must surely be by some words equally plain. The company were not entitled to raise any money by borrowing for the purpose of the separate undertaking until they had issued a certain number of shares and a certain amount had been paid up on each of those shares. Who would take shares in an undertaking unless the promoters shewed some confidence in the scheme by pushing on their operations and putting forward a prospectus explaining what they had done and what they proposed to do? Without pledging the credit of the company they could not have secured the land required for the purposes of the undertaking. If they issued the usual notices under the Lands Clauses Consolidation Act, any landowner on whose property they proposed to enter might stop their operations by requiring them to pay money into Court. If the company are right in their present contention, they could not pay money into Court until they had raised capital by the issue of shares. Nor, I suppose, would any contractor have entered into a contract with them if they had told him frankly what they say now, that they could only pay him out of capital which they had not raised and which they could only raise with the special consent of their shareholders not yet obtained, for if their shareholders failed

H. L. (I.) 1909

S. PEARSON & SON, LIMITED v. DUBLIN AND SOUTH EASTERN RAILWAY.

Lord Macnaghten

them it would be hopeless to expect aid from the general public. They could not even guarantee possession of the lands required for the works, as they agreed to do in the construction contract.

In my opinion, it is plain that it was intended that the company should pledge their credit so far as it might be necessary for the construction of the line, indemnifying themselves out of the capital authorized to be raised for the purpose of the special undertaking. Both as a matter of business and as a matter of law no other view is, I think, tenable.

The result is, in my opinion, that the order should go without the qualifying words at the end of the order, and that the respondents must pay the costs both here and below.

Order of the Court of Appeal in Ireland reversed with costs here and below; an unrestricted judgment to be entered for the plaintiffs for the sum of 23,836*l.* 2*s.* 9*d.* *with further interest from January* 23, 1908.

Lords' Journals, February 25, 1909.

Solicitors: *Markby, Stewart & Co., for Casey, Clay & Collins, Dublin; Holmes, Greig & Greig, for Wm. Fry & Son, Dublin.*

[HOUSE OF LORDS.]

COOKE (INFANT) BY HIS FATHER AND FRIEND (PAUPER) . . . . . } APPELLANT;

AND

MIDLAND GREAT WESTERN RAILWAY OF IRELAND . . . . . } RESPONDENTS.

H. L. (I.) 1909 March 1.

Distinguished. EDWARDS v. RAILWAY EXECUTIVE [1952] A.C. 737

Railway Company—Defective Fence—Negligence—Turntable—Infant Trespasser—Invitation to Danger.

A railway company kept a turntable unlocked (and therefore dangerous for children) on their land close to a public road. The company's servants knew that children were in the habit of trespassing and playing with the turntable, to which they obtained easy access through a well-worn gap in a fence which the railway company were bound by statute to maintain. A child between four and five years old playing with other children on the turntable having been seriously injured:—

Held, that there was evidence for a jury of actionable negligence on the part of the railway company.

The decision of the Irish Court of Appeal, [1908] 2 I. R. 242, reversed, and the judgment of Lord O'Brien C.J. and the decision of the King's Bench Division (Ireland) restored.

THE appellant by his father brought an action against the respondents for an injury sustained on the company's land in Meath under the circumstances stated in the head-note, the details of which are fully discussed in the judgments in this House. At the trial before Lord O'Brien C.J. the jury found a verdict for the plaintiff for 550*l.*, and judgment was entered accordingly. The jury found that the fence was in a defective condition through the negligence of the defendants; that the plaintiff was allured through the hedge and up to the turntable by the negligence of the defendants; and that it was by reason of the defendants' negligence and as the effective cause of it that the misfortune occurred. That judgment was affirmed by the King's Bench Division in Ireland (Palles C.B. and Johnson J., Kenny J. dissenting) and was afterwards set aside by the Court of Appeal in Ireland (Sir S. Walker L.C., FitzGibbon and Holmes L.JJ.). Hence this appeal by the plaintiff.

H. L. (I.) 1909

COOKE v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND.

1908. Nov. 23, 24, 30. *Barry, S.-G. for Ireland*, and *Dudley White* (both of the Irish Bar) (*Mark Stebbing* with them), for the appellant. The railway company was guilty of a breach of statutory duty in not properly fencing their property. The duty is strictly imposed by the Regulation of Railways Act, 1842 (5 & 6 Vict. c. 55), s. 10, by the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 50 and 68, and also by the Irish Railways Act of 1864 (27 & 28 Vict. c. 71), s. 15.

There was also negligence at common law. The general principle is stated by Lord Denman C.J. in *Lynch* v. *Nurdin* (1), who said it was negligent to have anything dangerous where it is "extremely probable that some other person will unjustifiably set it in motion to the injury of a third." In that case it was a child who was injured. There are many cases in the books where liability to damages has been held to attach where dangerous articles have been left accessible to children: *Harrold* v. *Watney* (2), where a defective fence was the source of mischief, and Rigby L.J. expressed approval of *Lynch* v. *Nurdin*. (1) In the American case of *Keffe* v. *Milwaukee and St. Paul Ry. Co.* (3) the circumstances were precisely similar, the accident being to a child trespasser playing with a turntable. The company were held responsible. In *Williams* v. *Eady* (4) a schoolmaster was cast in damages for leaving phosphorus accessible to a boy. In *Sullivan* v. *Creed* (5) the owner of a loaded gun left on his own land, on which a boy trespassed and was injured by the gun, was held liable. To a like effect are *Jewson* v. *Gatti* (6) and *Crocker* v. *Banks*. (7) *Clark* v. *Chambers* (8) is even more decisively in the appellant's favour. A person unlawfully erected a barrier and another person removed part of it, which was armed with spikes, and left it in the road. A passer by was injured by the spikes and held entitled to damages from the person who set up the barrier, though his doing so was not the proximate cause of the accident. Cockburn C.J. in that case expressed disapprobation of *Mangan* v. *Atterton* (9), where a child of four

(1) (1841) 1 Q. B. 29.
(2) [1898] 2 Q. B. 320.
(3) (1875) 18 Amer. Rep. 393.
(4) (1893) 10 Times L. R. 41.
(5) [1903] 2 I. R. 317.
(6) (1886) 2 Times L. R. 441.
(7) (1888) 4 Times L. R. 324.
(8) (1878) 3 Q. B. D. 327.
(9) (1866) 4 H. & C. 388; L. R. 1 Ex. 239.

was injured by a machine left unguarded in the market place, but, being a trespasser in meddling with the machine, was held not to be entitled to damages. *Hughes* v. *Macfie* and *Abbott* v. *Macfie* (1), where children were similarly disentitled, were held by Cockburn C.J. to be at variance with the authorities. *Illidge* v. *Goodwin* (2) was very like *Clark* v. *Chambers* (3) in that the injury was caused by a third person who had whipped the horse which damaged the plaintiff's window. "If," said Tindal C.J., "a man chooses to leave a cart standing on the street, he must take the risk of any mischief that may be done." *Engelhart* v. *Farrant* (4) is an application of these words. In *Lygo* v. *Newbolt* (5) the plaintiff was himself to blame for unauthorized conduct; and in *McDowall* v. *Great Western Ry. Co.* (6) the van was in a safe position and the accident would not have happened but for the interference of trespassers, and the defendants were held not liable. *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (7), in this House, is distinctly in favour of the appellant on account of the acquiescence of the railway company in the use of the line which led to the accident. Similar acquiescence must be inferred in the present case. Here surely there was an invitation to enter and play with a dangerous instrument. There was a gap in the fence with a well-beaten track leading to the turntable, which was left unfastened and seemed to be provided for the very purpose of a merry-go-round for children. There was evidence that this was clearly recognized by the company's servants.

Ronan, K.C., and *Featherstonhaugh, K.C.* (*Piers Butler* with them) (all of the Irish Bar), for the respondents. The railway company has not been guilty of negligence either by breach of a statutory duty or at common law. There is, in fact, no distinction in this respect. In *Ricketts* v. *East and West India Docks Ry. Co.* (8), *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Wallis* (9), and *Singleton* v. *Eastern Counties Ry. Co.* (10) the common law is stated to be the measure of statutory liability. The 68th section

(1) (1863) 2 H. & C. 744; 33 L. J. (Ex.) 177.
(2) (1831) 5 C. & P. 190, 192.
(3) 3 Q. B. D. 327.
(4) [1897] 1 Q. B. 240.
(5) (1854) 9 Ex. 302.
(6) [1903] 2 K. B. 331.
(7) (1878) 3 App. Cas. 1155.
(8) (1852) 12 C. B. 160.
(9) (1854) 14 C. B. 213.
(10) (1859) 7 C. B. (N.S.) 287.

H. L. (I.) 1909 COOKE v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND.

of the Railways Clauses Act, 1845, was stated by Jervis C.J. to have been passed in place of the 10th section of the Act of 1842: *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Wallis.* (1) Sect. 50 of the Act of 1845 was not intended to prevent trespass, but as a safeguard against falling on the line. There is, in truth, no enactment against trespass on railways generally, and the common law is still the measure of liability. Moreover, s. 68 is directed not towards the public, but to adjoining landowners, as the words "if the owners shall so require" plainly shew. The Irish Act of 1864 is equally inapplicable, as it prescribes a period of five years for the neighbouring owner to complain.

The common law duty is to fence in and not to keep out, to prevent cattle from straying. In *Hounsell* v. *Smith* (2), for example, there was held to be no duty to fence an excavation; and no damages were recovered in *Singleton* v. *Eastern Counties Ry. Co.* (3), where a small child had found its way to the line and was injured: see also *Binks* v. *South Yorkshire Ry. Co. and River Dun Co.* (4) *Cummings* v. *Darngavil Coal Co.* (5), *Devlin* v. *Jeffray's Trustees* (6), and *Prentice* v. *Assets Co.* (7), where the authorities are discussed by Lord Shand, are Scottish cases to the like effect. In *Hughes* v. *Macfie* (8) the danger was close to the road and a child was injured, but no damages were recovered. *Clark* v. *Chambers* (9) was a case of public obstruction. In *Bird* v. *Holbrook* (10) a man set a spring gun on his land without warning and was held liable, there being an intention to injure trespassers. *Slattery's Case* (11) is inapplicable because the railway company allowed people to cross the line for its own convenience. Holmes L.J. below expresses the case forcibly: "It would be a novel doctrine that a trespasser on property is converted into a licensee by the mere fact that the owner has not turned him off when he was committing similar acts of trespass." In *Blount* v. *Layard,*

(1) 14 C. B. 213.
(2) (1860) 7 C. B. (N.S.) 731.
(3) 7 C. B. (N.S.) 287.
(4) (1862) 3 B. & S. 244.
(5) (1903) 5 F. 513.
(6) (1902) 5 F. 134.
(7) (1890) 17 R. 484.
(8) 2 H. & C. 744; 33 L. J. (Ex.) 177.
(9) 3 Q. B. D. 327.
(10) (1828) 4 Bing. 628.
(11) 3 App. Cas. 1155.

reported with *Smith* v. *Andrews* (1), Bowen L.J. said, "Nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused," and continues: "The jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence." This language was approved in this House by Lord Macnaghten in *Simpson* v. *Attorney-General* (2), and Farwell L.J. expresses himself to a similar effect in the Stonehenge case, *Attorney-General* v. *Antrobus*. (3)

The evidence of acquiescence is weak and no case of anything like invitation is made out. In this as in all cases the trespasser must take the consequences of his trespass. The American cases are dealt with in Beven on Negligence, 3rd ed. p. 165.

Barry, S.-G. for Ireland, in reply.

The House took time for consideration.

1909. March 1. LORD MACNAGHTEN. My Lords, the only question before your Lordships is this: Was there evidence of negligence on the part of the company fit to be submitted to the jury? If there was, the verdict must stand, although your Lordships might have come to a different conclusion on the same materials.

I cannot help thinking that the issue has been somewhat obscured by the extravagant importance attached to the gap in the hedge, both in the arguments of counsel and in the judgments of some of the learned judges who have had the case under consideration. That there was a gap there, that it was a good broad gap some three feet wide, is, I think, proved beyond question. But of all the circumstances attending the case it seems to me that this gap taken by itself is the least important. I have some difficulty in believing that a gap in a roadside fence is a strange and unusual spectacle in any part of Ireland. But however that may be, I quite agree that the insufficiency of the fence, though the company were bound by Act of Parliament to maintain it, cannot be regarded as the effective cause of the accident.

(1) [1891] 2 Ch. 681, 691. (2) [1904] A. C. 476.
(3) [1905] 2 Ch. 188, 199.

H. L. (I.) 1909

COOKE v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND.

Lord Macnaghten.

The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?

This, I think, was substantially the question which the Lord Chief Justice presented to the jury. It seems to me to be in accordance with the view of the Court of Queen's Bench in *Lynch* v. *Nurdin* (1) and the opinion expressed by Romer and Stirling L.JJ. in *McDowall* v. *Great Western Ry. Co.* (2)

The Lord Chancellor of Ireland puts *Lynch* v. *Nurdin* (1) aside. He holds that it bears no analogy to the present case, because the thing that did the mischief there was a "cart in the public street—a nuisance." But no question of nuisance was considered in *Lynch* v. *Nurdin*. (1) That point was not suggested. The ground of the decision is a very simple proposition. "If," says Lord Denman, "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." If that proposition be sound, surely the character of the place, though, of course, an element proper to be considered, is not a matter of vital importance. It cannot make very much difference whether the place is dedicated to the use of the public or left open by a careless owner to the invasion of children who make it their playground.

I think the jury were entitled and bound to take into consideration all the circumstances of the case—the mode in which the turntable was constructed; its close proximity to the wall by which the plaintiff's leg was crushed; the way in which it was

(1) 1 Q. B. 29. (2) [1903] 2 K. B. 331.

left, unfenced, unlocked, and unfastened; the history of this bit of ground and its position, shut off as it was by an embankment from the view of the company's servants at the station, and lying half derelict. After the construction of the embankment it served no purpose in connection with the company's undertaking, except that at one time a corner of it was used as a receptacle for some timber belonging to the company, and afterwards as a site for this turntable. In other respects, and apart from these uses, it seems to have been devoted or abandoned to the sustenance of the railway inspector's goat and the diversion of the youth of Navan. It is proved that in spite of a notice board idly forbidding trespass it was a place of habitual resort for children, and that children were frequently playing with the timber, and afterwards with the turntable. At the date of the trial, twelve months after the accident, a beaten path leading from the gap bore witness both to the numbers that flocked to the spot and to the special attraction that drew children to it. It is remarkable that not a single word of cross-examination as to either of these points was addressed to the principal witnesses for the plaintiff, Tully, the herd, and Gertrude Cooke, the plaintiff's sister; nor was any explanation or evidence offered on the part of the company. Now the company knew, or must be deemed to have known, all the circumstances of the case and what was going on. Yet no precaution was taken to prevent an accident of a sort that might well have been foreseen and very easily prevented. They did not close up the gap until after the accident. Then it was the first thing thought of. But it was too late. They did not summon any of the children who played there, or bring them before the magistrates, as a warning to trespassers and a proof that they were really in earnest in desiring to stop an objectionable practice which had gone on so long and so openly. They did not have their turntable locked automatically in the way in which Mr. Barnes, C.E., whose evidence is uncontradicted, says it is usual to lock such machines. The table, it seems, was not even fastened. There was a bolt; but if Cooke, the father of the plaintiff, is to be believed, the bolt was rusty and unworkable. The jury were not bound to believe Fowler, a ganger in the service of the company,

H. L. (I.) 1909 COOKE v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND. Lord Macnaghten.

in preference to Cooke. Fowler, after some incautious admissions which the jury probably accepted as true, turned round and shewed himself, as the Chief Justice says, to be hostile to the plaintiff. He prevaricated to such an extent that the jury were justified in disregarding everything said by him with the view of shielding his employers or saving himself from blame, whether it came out of his own head, as the nonsense he talked about rat-holes, or was suggested by counsel, as the expression used of "hunting" children off the ground.

The evidence is discussed fully, and I think fairly, by Johnson J. I agree in the conclusion at which he arrived.

It seems to me that the Chief Justice would have been wrong if he had withdrawn the case from the jury. I think the jury were entitled, in view of all the circumstances, on the evidence before them, uncontradicted as it was, to find that the company were guilty of negligence. I am therefore of opinion that the finding of the jury should be upheld and the judgment under appeal reversed, with pauper costs here and costs below; and I move your Lordships accordingly.

I will only add that I do not think that this verdict will be followed by the disastrous consequences to railway companies and landowners which the Lord Chancellor of Ireland seems to apprehend. Persons may not think it worth their while to take ordinary care of their own property, and may not be compellable to do so; but it does not seem unreasonable to hold that, if they allow their property to be open to all comers, infants as well as children of maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and who are unable, in consequence of their tender age, to take care of themselves.

Lord Atkinson. My Lords, two or three facts are, I think, plain upon the evidence given in this case. 1. There is a well-marked gap in the fence separating from the public road the triangular piece of ground in which the turntable which caused the accident was erected. 2. This gap bore all the marks of having been much used. 3. By it easy access is afforded to this

piece of ground, either to adults or to children passing along the public road. In the view I take of the case it is unnecessary to consider what was the statute which imposed the duty, if any, on the company to fence off this triangular piece of ground from the public road, or towards what class of person, if any, that duty, if imposed, was due, because I concur with the Irish Court of Appeal in thinking that the failure of the railway company to discharge this duty, even if it were due from them towards this unfortunate child, the plaintiff in this action, was not the causa causans of the accident.

The chain of causation between the alleged negligence of the company in this respect and the injury to the child is, I think, broken. The negligence was not an effective cause of the ultimate result. That, however, in my opinion, by no means disposes of the case. The authorities from *Lynch* v. *Nurdin* (1) downwards establish, it would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, and public places may not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred.

(1) 1 Q. B. 29.

H. L. (I.) 1909. COOKE v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND. Lord Atkinson.

I omit the words "public place or thoroughfare" from the immediately preceding sentence, because I think the principle of these decisions applies to any place to which boys or children have a legal right to go and may reasonably be expected to be not unlikely to frequent.

The origin of the legal right to be in the particular place in which the boy or child comes in contact with the vehicle or machine, or the mode in which that legal right has been acquired, is, in my view, irrelevant.

The right may be only the restricted right of a bare licensee, or it may be the more extended right of a person invited. The principle that the owner of land upon which a licensee enters on his own business, or for his own amusement, is only responsible for injuries caused to the latter by hidden dangers of which the former knew, but of which the licensee was ignorant and could not by reasonable care and observation have detected, must, in any given case, be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the licence, knew, or ought to have known, the licensee possessed. To the blind the most obvious danger may be a trap. To the idiotic the most perilous act may appear safe and cautious. The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons.

I therefore think that if the owner of any premises on which dangerous and alluring machines or vehicles of the character I have mentioned are placed gives leave to boys of a mischievous and intermeddling age, or to children of such tender years as to be quite unable to take care of themselves, to enter upon the premises, he will be quite as responsible for any injury one of the boys or children may sustain as if he had deposited the same machine, or left the same vehicle, in the public street. The right of the boy or child to be on the public street, as one of the public, is, no doubt, a larger right than that which would belong to him as a licensee, but the knowledge of the owner of the machine or vehicle that he is placing or leaving in the way of

boys and children a temptation alluring to them, and dangerous in its nature, with which, moreover, it is not improbable they will come in contact, is not less in the latter case than in the former. And it would appear to me that the liability of the owner is at bottom based upon this knowledge.

The question may have to be determined by your Lordships on some future occasion whether or not the owner of premises which he knows boys and children of the class and character above mentioned are in the habit of frequenting merely as trespassers would be liable if he placed dangerous and alluring machines upon them to the same extent as if these boys or children were his licensees, and, if not, to what extent, and subject to what conditions his liability is to be restricted.

In the view I take it is not necessary to determine that question in the present case, because I think that there was evidence proper to be submitted to the jury that the children living in the neighbourhood of this triangular piece of ground, of which the plaintiff was one, not only entered upon it, but also played upon the turntable—a most important addition—with the leave and licence of the defendant company.

In my opinion the previous history and actual physical condition of the premises were elements proper for consideration on this point, the existence and condition of the gap in the hedge amongst others. The witness Luke Tully deposed that children were in the habit of playing on the turntable and making it revolve, that he never saw any one turn them away from it, and that the porters were always there. Gertrude Cooke's evidence is to the same effect as to the user. Fowler, the officer of the company, the immediate subordinate of Monahan, the inspector of the line in the Navan district, to whom it was his duty to report, and to whom, he states, he would report everything he saw, states that Monahan himself would be down where this fence was and all over the place, that the turntable was erected about four years from the time of the trial, and then deposes as follows: "Four years from this date—you are often about the place? (A.) Yes. And you have often seen children playing at the turntable? (A.) Yes. Going back for the last couple of years?

H. L. (I.) 1909

COOKE v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND.

Lord Atkinson.

(A.) Yes. Adjusting the table? (A.) Yes. And riding on it? (A.) Yes. It is a dangerous thing? (A.) Yes. For children. You saw that very often before this occurrence? (A.) Two or three times before this occurrence."

No doubt, on cross-examination by counsel for the company, his own employers, he qualifies his evidence in chief to some extent by saying that the occasions on which he saw these children were two in number and were in date twelve months previous to the trial, that these children ran away when they saw him because they were trespassers, and that he never saw them there without hunting them away. It would have been quite competent for the jury to have disbelieved the evidence extracted on this friendly cross-examination. Mr. Ronan, in his most able argument on behalf of the company, admitted that the turntable in the condition in which it actually was on the occasion of the accident was a dangerous plaything for children. But the danger sprang apparently altogether from its mobility. Had it been locked or fastened in such a way that it could not have been readily made to revolve by boys like young Monahan, accidents like that which happened in this case never could have occurred.

For the omission to make the turntable fast the defendants are responsible. If the plaintiff entered upon these premises and played on this turntable with the leave and licence of the defendants, then these latter owed to the child a duty not to permit the machine to be in the movable and dangerous, because movable, condition in which they permitted it in fact to be. Young Monahan and his playmate no doubt intervened and made the turntable revolve, but the omission of the defendant company to discharge the duty which, on the above-mentioned assumption, I think they owed to the plaintiff, namely, to cause the machine to be made immovable by boys and children, and therefore a safe thing for them to play with, was not only the causa sine qua non but also the causa causans of the accident. It was, of course, for the jury to determine whether leave and licence had in fact been given. There was, I think, as I have already stated, evidence proper for their consideration on that question.

In my opinion, therefore, the defendants were not entitled to the direction for which they asked at the trial; and as that is the only question raised for your Lordships' decision, I think the appeal should be allowed with the costs usual in such cases.

LORD COLLINS. My Lords, this case has given rise to much difference of view, the Lord Chief Justice, who tried the case, the Lord Chief Baron, and Johnson J. being in favour of the plaintiff, and three judges of the Court of Appeal and Kenny J., in the Divisional Court, in favour of the defendants. I am of opinion that there was evidence of actionable negligence fit for the consideration of a jury. I think there was evidence that the turntable, fastened as it was only by a bolt so easily withdrawn, was a dangerous thing for young children to play with, and that the defendants, as reasonable men, ought to have known it; and that, situate as it was in such a conspicuous place, and frequented so largely by young people without remonstrance by the defendants, with easy access from the Bridge Road through a gap in the hedge and along a well-trodden path down the embankment, it could hardly fail to present an irresistible attraction to young persons. I think all these facts in combination were evidence from which a jury might well infer not merely a licence, but an invitation, which fixed the defendants with a high responsibility towards those people to whom such an invitation would mainly appeal, namely, those who from their tender age would be deemed incapable of caution and therefore of contributory negligence. I have not forgotten the evidence that on one occasion persons playing on the spot were warned off, or that there was a notice board near the gate leading from the high road which may have contained a caution, but the bearing of these facts was for the jury. I am aware of the mischief, so much dwelt upon by Mr. Ronan in his brilliant argument, of making it difficult for landowners to admit the public to enjoy the amenities of their private domains. But every case of this kind must be dealt with on its special facts, and the line of legal immunity will, I think, be found to coincide with the line of common sense, of which juries are very capable judges. Tempting or even allowing children to make a plaything of a dangerous machine without

H. L. (I.) 1909 — COOKE v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND. — Lord Collins.

taking adequate, or indeed any, precautions against the probable danger of mischief through their imprudence is a form of benevolence which ought not to be encouraged. The Supreme Court of America has affirmed the liability of the railway company in a case as nearly as possible identical in its facts with that under appeal: *Railroad Co.* v. *Stout* (1); and the principle of allurement in the case of children has been recognized in our own Court of Appeal: *Jewson* v. *Gatti.* (2)

With unfeigned respect to the Court of Appeal, I think they have hardly given sufficient weight to the special considerations applicable in the case of young children as distinguished from adults.

LORD LOREBURN L.C. My Lords, I am content to act upon the opinion of my noble and learned friend Lord Macnaghten, having regard to the peculiar circumstances, namely, that this place, on which the defendants had a machine, dangerous unless protected, was to the defendants' knowledge an habitual resort of children, accessible from the high road near thereto, as well as attractive to the youthful mind; and that the defendants took no steps either to prevent the children's presence or to prevent their playing on the machine, or to lock the machine so as to avoid accidents, though such locking was usual. I must add that I think this case is near the line. The evidence is very weak, though I cannot say there was none. It is the combination of the circumstances to which I have referred which alone enables me to acquiesce in the judgment proposed by my noble and learned friend Lord Macnaghten.

My Lords, in regard to the form of the judgment I think the preferable method would be to restore the verdict and the judgment of the Lord Chief Justice, which is unequivocal and provides for the payment of this money into the hands of the Accountant-General to be invested subject to an application as there stated. But if either party should desire to have some

(1) (1873) 17 Wall. (U.S.) 657. [The doctrine of that decision has been freely criticized in America, and some State Courts refuse to accept it. See Burdick on Torts *ad fin.*—F. P.]

(2) 2 Times L. R. 441.

other form of judgment consistent with the decision of your Lordships' House, I suppose it will be open to him to ask to have an alteration made without the application of counsel. In the meanwhile I propose it in that form.

H. L. (I.) 1909 COOKE v. MIDLAND GREAT WESTERN RAILWAY OF IRELAND

Order of the Irish Court of Appeal reversed, and the verdict and judgment entered for the plaintiff by the Lord Chief Justice of Ireland restored, with pauper costs here and costs below.

Lords' Journals, March 1, 1909.

Solicitors: *Herbert Z. Deane, for William D. Sullivan, Navan, Ireland; Martin & Co., for John Kilkelly, Dublin.*

[HOUSE OF LORDS.]

REFUGE ASSURANCE COMPANY, LIMITED. APPELLANTS; AND KETTLEWELL . . . . . RESPONDENT.

H. L. (E.) 1909 *March* 5.

Insurance, Life—Voidable Policy—Principal retaining Benefit obtained by Fraud of Agent—Recovery of paid Premiums.

The holder of a policy of insurance being minded to give up paying the premiums was persuaded to continue the payments by a false representation of the insurance company's agent that if she paid the premiums for a certain time she would receive a free policy. The representation was made without the authority or knowledge of the company, and the company refused to grant a free policy, but retained the premiums:—

Held, that the holder of the policy was entitled to recover from the company the premiums paid upon the faith of the representation.

Decision of the Court of Appeal, [1908] 1 K. B. 545, affirmed.

THE appellants issued a policy of assurance for 13*l.* 16*s.* payable to the respondent upon the death of her brother. The respondent paid the premiums regularly for a certain period and then bethought her that it was not worth her while to continue paying them, but was persuaded to go on paying by a district superintendent of the appellants, who assured her that if she

H. L. (E.) 1909

REFUGE ASSURANCE COMPANY, LIMITED v. KETTLEWELL.

kept on for five years she would get a free policy. Another agent of the appellants told her that at the end of five years she would get out all she put in. These statements were without foundation and were made without the authority or knowledge of the appellants. At the end of the five years the respondent, having paid the premiums upon the faith of the above misrepresentations, claimed a free policy. The appellants having refused her request, the respondent sued them in the county court of Lincolnshire for a return of the premiums so paid. The learned county court judge told the jury that if the agents or either of them had been guilty of fraud the appellants had benefited by the fraud by retaining the premiums and thus ratifying the representations even if they were not within the scope of the agents' authority. The jury found a verdict for the plaintiff for 10*l.* 8*s.*, the amount of the premiums so paid, and judgment was entered accordingly. The judgment was affirmed by the King's Bench Division (Phillimore and Bray JJ.) (1) and by the Court of Appeal (Lord Alverstone C.J., Sir Gorell Barnes, and Buckley L.J.). Hence this appeal by the insurance company.

Manisty, K.C., and *W. H. Owen* (*Nield* and *E. A. Hitchens* with them), for the appellants. The contract was not in the power of the agent to make and was not ratified by the appellants. A statement made outside the scope of the agent's authority is not binding on the company.

[LORD LOREBURN L.C. Do you really contend that the principal can keep the money obtained by the fraud of the agent? (2)]

Yes: there was a consideration passing from the company, the risk of having to pay the policy money. In *Newlands* v. *National Employers' Accident Association* (3) it was held that the secretary of a company has no general authority to make representations to induce a person to take shares. Bowen L.J. there said, "It appears to me that prima facie the functions of a secretary are clerical and ministerial only." The duties of the agent in this

(1) [1907] 2 K. B. 242.

(2) "May one be pardon'd and retain the offence?" — *Hamlet*, Act III., sc. 3.

(3) (1885) 54 L. J. (Q.B.) 428.

case were wholly ministerial. The respondent has for several years had the benefit of the contract, and the company has during that period been at risk. It is inequitable that the benefit should have been enjoyed without any consideration given. [The cases cited in the Court below were discussed.]

Giveen, for the respondent, was not heard.

LORD LOREBURN L.C., without giving any reasons, moved that the appeal be dismissed.

The EARL OF HALSBURY and LORDS ASHBOURNE, MACNAGHTEN, and JAMES OF HEREFORD silently concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs here and below.

Lords' Journals, March 5, 1909.

Solicitors: *Hopwood & Sons, for C. M. Beaumont, Manchester; Clarkson, Greenwell & Co., for John Barker, Grimsby.*

[HOUSE OF LORDS.]

MAYOR, &c., OF STEPNEY . . . . . APPELLANTS;

AND

GINGELL, SON & FOSKETT, LIMITED . . RESPONDENTS.

THERE is nothing to report in this appeal except that it resolved itself into a question of the form of the order made by the Court of Appeal (1), as will be seen in the judgment of Lord Loreburn L.C.

Macmorran, K.C., and *Courthope Munroe* (*Sydney G. Turner* with them), for the appellants.

Avory, K.C., *Frampton*, and *A. E. Woodgate*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, in listening to this appeal I thought I should have to express an opinion on a vexed and

(1) [1908] 1 K. B. 115.

H. L. (E.) 1909

STEPNEY CORPORATION v. GINGELL, SON & FOSKETT, LIMITED.

Lord Loreburn L.C.

complicated question relating to the law of markets, but I find now at the conclusion of the argument that the only objection is to the form of the order, because it is supposed to mean something different from what to my mind it obviously does mean.

Mr. Avory agrees that the only right he has is a right in the salesmen to be in, say, Commercial Road, or another adjoining road, subject to directions to move to a more convenient place according to the opinion of the proper authority. I think that is what the declaration means, although, of course, the declaration will speak for itself.

What the appellants want apparently is a declaration that the plaintiffs are not entitled except in so far as they may have acted under the directions of the proper authority, but that the proper authority is bound to give such directions. I confess to my entire inability to see any distinction of substance between the order preferred by the appellants and the order made by the Court of Appeal. It is rather an unusual occurrence that there should be an appeal about what amounts to nothing. Accordingly I think this appeal ought to be dismissed with costs.

The EARL OF HALSBURY and LORDS ASHBOURNE and MACNAGHTEN concurred.

Judgment appealed from affirmed and appeal dismissed with costs.

Lords' Journals, March 15, 1909.

Solicitors: *George Slade; Baddeleys & Co.*

[HOUSE OF LORDS.]

DENABY PARISH OVERSEERS AND OTHERS APPELLANTS; AND DENABY AND CADEBY MAIN COLLIERIES, LIMITED . . . . . RESPONDENTS.

H. L. (E.) 1908 *March* 30.

Poor Rate—Appeal—Notice of Appeal—Notice to Assessment Committee—Entry and Respite of Appeal—Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

Sect. 1 of the Union Assessment Committee Amendment Act, 1864, requires the appellant against a poor rate in certain cases to give to the union assessment committee "twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made."

The respondents gave the union assessment committee less than twenty-one days' notice previous to the quarter sessions next after the decision appealed against:—

Held, that the respondents were entitled at the said quarter sessions to enter continuances and respite the appeal to the next quarter sessions in accordance with the practice existing under previous statutes requiring similar notices.

Decision of the Court of Appeal reported as *Rex* v. *West Riding of Yorkshire Justices*, [1908] 2 K. B. 635, affirmed.

THE respondents, having been assessed to the poor rate in respect of their collieries, gave to the assessment committee of the Doncaster Union and to the overseers of the parish of Denaby due notice of their objection to the assessment and to the valuation list, and failed to obtain relief, the assessment committee in August, 1907, deciding against them. On October 3 the respondents gave notice to the assessment committee and the overseers of their intention to appeal at the next quarter sessions against the rate or assessment, and stated their grounds of appeal. The next quarter sessions were held on October 14, less than twenty-one days after the notice was given. The Court of quarter sessions held on October 14 having refused an application by the respondents to enter and respite the appeal, the King's Bench Division (Lord Alverstone C.J., Ridley and Darling JJ.) granted a mandamus to the justices to enter and respite the appeal, and this decision was affirmed by the Court

H. L. (E.) 1909

DENABY OVERSEERS v. DENABY AND CADEBY MAIN COLLIERIES, LIMITED.

of Appeal (Sir Gorell Barnes and Farwell L.J., Fletcher Moulton L.J. dissenting). Hence this appeal by the overseers and the assessment committee.

March 5, 8. *Macmorran, K.C.*, and *Shortt*, for the appellants. The notice was not given in time and was void. The language of the Act of 1864 is fairly clear: "Before any appeal shall be heard . . . . the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal and the grounds thereof to the assessment committee." This condition was not fulfilled, as the notices were only given on October 3 and the sessions were held on October 14. The notice was a condition precedent to appeal, and no power is given, as under the old practice, to enter and respite. Under the Poor Relief Act, 1743, "reasonable notice to the churchwardens or overseers" was to be given of "appeal to the next general or quarter sessions of the peace"; but if no such notice was given, the justices were "to adjourn the appeal to the next quarter sessions and then and there finally hear and determine it." *Liverpool Gas Co.* v. *Everton* (1), though not exactly in point, is favourable to the appellants. It was under the Act of 1864 and it was held that an appeal from an order of the assessment committee made on August 3 ought to have been heard at the quarter sessions of September 1 and could not be entertained at the October sessions. Keating J. pointed out that the appellants had twenty-one days and some days to spare. The respondents here had a longer interval to spare. In *Reg.* v. *Surrey Justices* (2) there was only one day for the appellants to consider their position and that was held not to be sufficient. That was a case under the Quarter Sessions Act, 1849, which requires fourteen days' notice to the overseers. *Imperial and Grand Hotels Co.* v. *Christchurch Guardians* (3) is not applicable, as it was not an appeal from an order of the assessment committee, but an objection to the rate which may be made "at any time" during the currency of the rate. The Court of Appeal have held that the twenty-one days' notice under the Act of 1864 merely replaces the

1) (1871) L. R. 6 C. P. 414. (2) (1880) 6 Q. B. D. 100.
(3) [1905] 2 K. B. 239.

fourteen days' notice required by the Quarter Sessions Act, 1849, s. 1. That is not so. There are two conditions precedent prescribed by the Act of 1864. The twenty-one days' notice of intention to appeal must be given, and objection must have been made to the assessment committee against the list which the committee has failed to remove. The Act of 1864 dealt with a newly constituted body created by the Union Assessment Committee Act of 1862. That committee has no locus standi without the consent of the guardians or overseers; but on obtaining such consent they become the essential parties. The assessment committee might have opposed an application to respite. The case of *Reg.* v. *Eyre* (1) was wholly different. There the sessions were held bound to enter and respite the appeal because notice had not been given to the parties objected to as required by the Poor Rate Act, 1801. It is necessary that appeals should be promptly entered and the assessment committee protected. The committee acts at its peril, and in *Reg.* v. *Essex Justices* (2) they were disallowed their costs as respondents because they had not obtained the consent of the guardians to appear as respondents.

Ryde and *Jeeves* (*J. W. H. Brodrick* with them), for the respondents. The Act of 1864 must be read together with the earlier Acts, the Poor Relief Act, 1743, the Poor Rate Act, 1801, and the Quarter Sessions Act of 1849. During the whole period from the first of these Acts the right of an appellant to have his appeal entered and respited, notwithstanding any failure in respect of notice, has been recognized. Thus in *Reg.* v. *Eyre* (1) the appeal was entered and respited and Coleridge J. said that the whole legislation must be read together. The practice before 1864 was always to give an appellant a locus pœnitentiæ. In the cases of *Rex* v. *Buckinghamshire Justices* (3), *Rex* v. *Staffordshire Justices* (4), and *Reg.* v. *London Justices* (5) it was held to be compulsory on the sessions to receive and adjourn the appeal where no notice or insufficient notice had been given. The notice of appeal to the assessment committee was not intended to be placed on any other footing than the notice to overseers and

(1) (1856) 6 E. & B. 992.
(2) [1895] 1 Q. B. 38.
(3) (1803) 3 East, 342.
(4) (1806) 7 East, 549.
(5) (1846) 9 Q. B. 41.

H. L. (E.) 1909

DENABY OVERSEERS v. DENABY AND CADEBY MAIN COLLIERIES, LIMITED.

other parties under the earlier legislation. The probable reason of the intervention of the assessment committee was to prevent collusion between an appellant and the overseers; and that committee can mero motu increase an assessment. In *Liverpool Gas Co.* v. *Everton* (1) Montague Smith J. said: "It is only where the next sessions are the next practicable sessions that the party is bound to enter and respite the appeal"; and "Where the next sessions are not such sessions as are practicable for the trial of the appeal, he is not bound to enter and respite at those sessions." That decision is therefore substantially in the respondents' favour. In the words of Lord Herschell in *London County Council* v. *Erith* (2), this House will not "depart from a practice which has prevailed for a very long period, and which has been sanctioned by judicial authority."

Macmorran, K.C., in reply.

The House took time for consideration.

March 30. LORD LOREBURN L.C. My Lords, in my opinion the order appealed from ought to be affirmed.

The dispute turns upon the true meaning of the first section of the Union Assessment Committee Amendment Act, 1864. When this section says that twenty-one days' notice is to be given to an assessment committee "previous to the special or quarter sessions to which such appeal is to be made," does that mean the next practicable sessions, or does it mean the sessions at which the appeal is to be heard, whether the next or a later sessions?

The words themselves seem to admit of either construction. You may say, so far as language is concerned, an appeal is made to the sessions that have to hear it. Or you may say the appeal is made to the next sessions (that is the next practicable sessions), because the Act of 1743 requires that the aggrieved party must appeal to the next sessions, even though it may be merely to enter and respite. In this ambiguity the state of the law at the time the Act of 1864 was passed may profitably be considered.

(1) L. R. 6 C. P. 414. (2) [1893] A. C. 562, 599.

Then, as now, an aggrieved ratepayer, though obliged to appeal to the next sessions, might, by omitting to give fourteen days' notice to the overseer or by giving insufficient notice, postpone to the following sessions the effective trial of his appeal. That this is so, and has been so for a very great length of time, is not disputable. When in 1801 an additional duty was imposed on the aggrieved ratepayer to give notice to any other person interested, it was held long ago that the new provision was to be read in harmony with the old law. So the right of entering and respiting was not lost, though the new notice had not been given. In my opinion the same applies to the present case, and the notice under the Act of 1864 will be in time if it is given for the sessions at which the appeal is to be heard. No doubt it is possible to find grammatical arguments to the contrary. But the words of the Act will equally bear the construction which the Court of Appeal places on them, and the intention was, I infer, merely to graft a new notice on to the old practice. Convenience points in the same direction.

EARL OF HALSBURY. My Lords, I am of the same opinion. In the jumble of statutes which treat of this matter, I think what the noble and learned Lord on the woolsack has pointed out is the most convenient course, but to me it seems to be somewhat of a scandal that a mere question of practice, which might in the original Act have been settled in a single sentence without any difficulty, should have to come up to the Court of Appeal and the highest Court in the kingdom; for it is for the mere purpose of settling a question of practice that this appeal comes before us.

LORD ASHBOURNE. My Lords, in my opinion the Court of Appeal was right and the appeal should be dismissed.

I think that the Act of 1864 must be read together with the earlier Acts providing for notices of appeal to quarter sessions. In reference to those earlier Acts, beginning with the Poor Relief Act, 1743, a clear and settled practice had grown up which must now be accepted, although Lord Campbell over fifty years ago intimated that but for the practice he probably would not have

H. L. (E.) 1909

DENABY OVERSEERS v. DENABY AND CADEBY MAIN COLLIERIES, LIMITED.

Lord Ashbourne.

arrived at the decision he announced on the construction of those statutes.

The question arises in reference to s. 1 of the Act of 1864, which prescribed the giving of a twenty-one days' notice of appeal to the union assessment committee. As a matter of fact in this case the notice was given before the appeal could be heard at the quarter sessions, to which, according to the practice under the earlier statutes, it would have been respited as of course. But it is urged that that is late because the notice should have been served twenty-one days before the previous quarter sessions, and that technically the appeal should be held to be then made. In my opinion the new notice of twenty-one days is merely an addition to existing notices required for appeals and must fall in with the existing practice under the earlier Acts. Sect. 1 of the Act of 1864 begins with the words "Before any appeal shall be heard," and I do not think that they are varied by the subsequent part of the section, or that it would be a reasonable construction to hold that the notice should be given twenty-one days before the appeal is entered and respited. Sect. 1 draws a distinction between the giving of a notice of objection to the valuation list and the failure to obtain relief thereby, which is a condition precedent to the making of an appeal, and the twenty-one days' notice, which is a condition precedent to the hearing.

If the notices under the earlier Acts are treated as bound by their own settled practice and the notice added in 1864 is to be treated differently and in the way contended for, extraordinary results would follow. It is conceded that, if the twenty-one days' notice had been given at the time suggested by the appellants and the other notices had not been given at all, the person wishing to appeal could have his appeal respited and heard at the next quarter sessions. Yet it is argued that there can be no appeal in the case when the twenty-one days' notice is not given at the time the appellant contends for, even if the twenty-one days' notice had been given in full time for the hearing to the assessment committee, who had previously been given under the same section notice of objection against the valuation list, and the objector should have failed to obtain relief. If the argument

was well founded, it would be a difficulty for an appellant and might lead to uncertainty and confusion.

I concur in the motion proposed by the Lord Chancellor.

LORD MACNAGHTEN. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 30, 1909.

Solicitors: *Van Sandau & Co., for F. E. Nicholson, Doncaster ; B. Duncomb Sells.*

[HOUSE OF LORDS.]

RHONDDA URBAN DISTRICT COUNCIL . . APPELLANTS;

AND

TAFF VALE RAILWAY COMPANY . . . . RESPONDENTS.

Railway Company—Bridge—Approaches—Public Carriage Road carried over Railway—Width of Bridge—Liability of Railway Company—Special Act —Construction—Railways Clauses Consolidation Act, 1845 (8 *& 9 Vict. c.* 20), *ss.* 50, 51.

In construing the proviso for widening a "bridge" in s. 51 of the Railways Clauses Consolidation Act, 1845, that section must be read with the group of sections of which s. 51 is part. So read "bridge" means the bridge proper and does not include the approaches to the bridge.

By the Taff Vale Railway Act, 1836, s. 69, where a bridge shall be erected for carrying a public highway over the railway, the road over the bridge must be formed and at all times continued of a width of not less than fifteen feet.

By the Taff Vale Railway Act, 1846, the provisions of the Act of 1836 were incorporated, except such as were inconsistent with (inter alia) the provisions of the Railways Clauses Consolidation Act, 1845.

A bridge carrying a public carriage road over the Taff Vale Railway was erected under the Act of 1846 of the width of eighteen feet. The average available width of the road having been afterwards increased beyond the width of the bridge on either side and to a width exceeding twenty-five feet, the railway company were required by the urban district council to widen the bridge and approaches in accordance with

H. L. (E.)
1909
RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY.

the provisions of ss. 50 and 51 of the Railways Clauses Consolidation Act, 1845:—

Held, that the obligations of the company were governed by ss. 50 and 51 of the Act of 1845, and not by the special Acts, and that the company were bound to widen the bridge proper to the width of twenty-five feet, but were not bound to widen the approaches to the bridge.

Decision of the Court of Appeal, [1908] 1 K. B. 239, reversed and decision of Phillimore J., [1907] 1 K. B. 739, restored.

THE facts of this appeal material to this report are stated in the head-note. The details are set out in each of the reports of the two decisions below. The Court of Appeal (Vaughan Williams L.J., Sir Gorell Barnes, and Bigham J.) having dismissed the action brought by the district council against the railway company and reversed the decision of Phillimore J. which was restored by this House, the council brought the present appeal. The first point argued in this House was whether the obligations of the railway company were governed by their special Acts of 1836 (6 & 7 Will. 4, c. lxxxii.), s. 69, and 1846 (9 & 10 Vict. c. cccxciii.), ss. 1 and 3, or by s. 51 of the Railways Clauses Consolidation Act, 1845.

March 9, 11. *Upjohn, K.C.*, and *Lush, K.C.* (*Trevor Lewis* with them), for the appellants. In any conflict between the Railways Clauses Act, 1845, and any special Act the latter must give way to the former. Here there is an inconsistency between s. 69 of the respondents' Act of 1836, which requires a width of twenty-five feet for a turnpike road and of fifteen feet for a highway or occupation road over a railway, and s. 50 of the Railways Clauses Act, where thirty-five feet in one case and twenty-five feet in the other are made compulsory. Vaughan Williams L.J. fails to appreciate the full bearing of s. 1 of the Railways Clauses Act, by which all the clauses and provisions of the Act are incorporated into every special Act, except where expressly varied or excluded.

Levett, K.C., and *P. O. Lawrence, K.C.* (*J. G. Wood* with them), for the respondents. If every bridge of the company were fifteen feet wide the requirement of Parliament would be fulfilled. The Railways Clauses Act has no operation. Under the latter there are two classes of enactment—one where all

the sections of the Act are incorporated in special Acts, the other where there is express variation or exception. The Act of 1845 is an abstract Act to which a concrete effect is only given by the special Act. Till then it is in suspended animation. When an earlier Act is incorporated in a later, the earlier is re-enacted totidem verbis, except where the Railways Clauses Act has made provisions in substitution of those in the special Act. Thus in the Act of 1836 in the circumstances described there is to be an application to a justice of the peace and a penalty of 25*l.*; in the general Act of 1845, ss. 63 and 64, the application is to the Board of Trade and the penalty 5*l.*; and a notice of ten days in the special Act is replaced by one of fourteen days in the Act of 1845. There is no conflict in such cases, but where there is a conflict the special Act prevails. Sect. 69 of the special Act of 1836 and s. 50 of the Railways Clauses Act are mutually exclusive, but not inconsistent. Phillimore J. was wrong in holding that the re-enacted Act of 1836 is not a special Act in the sense of the Railways Clauses Act, 1845. Bigham J. puts the case accurately when he says, "Sect. 50 of the general Act, with which" s. 69 of the Act of 1836 "is supposed to be inconsistent, is cut down and made consistent with the incorporated Act of 1836 by the words in brackets 'except as otherwise provided by the special Act.'"

Lord Loreburn L.C. My Lords, the point in this case which your Lordships have now to determine is really very short. I think s. 50 of the Act of 1845 applies, and the width of the bridge must be the twenty-five feet there required. No doubt this subject has been involved in a coil of argument relating not merely to the meaning of the clauses themselves, but also to the successive interpretations put upon them by the several judges who have considered them; and so verbal controversy has bred verbal controversy until your Lordships have had to take a day over the consideration of this case, which ought to have occupied a much shorter time.

The real question at the root of the discussion is whether the provisions of s. 69 of the Act of 1836 are inconsistent with the provisions of s. 50 of the Act of 1845. This must be decided by

H. L. (E.) 1909 RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY. Lord Loreburn L.C.

comparing the provisions themselves. It is not sound reasoning to say that they are inconsistent because the words in s. 50, "except as otherwise provided in the special Act," exclude s. 69, for the exclusion itself depends upon the question whether those provisions are inconsistent or not. It is arguing in a circle. You must look at the provisions themselves and see if they are or are not consistent.

I think they are consistent. To say that a bridge shall not be less than fifteen feet wide is consistent with saying that it shall be twenty-five feet, as may best be shewn by taking the case of a bridge that is twenty-five feet and asking whether it does not comply with both those provisions.

I must say with the greatest respect I think this is a perfectly plain case.

The EARL OF HALSBURY and LORDS ASHBOURNE and MACNAGHTEN agreed.

The question as to the widening of the approaches to the bridge was then argued.

March 11, 12. *Upjohn, K.C.*, and *Lush, K.C.* (*Trevor Lewis* with them), for the appellants. The liability of the respondents includes the approaches to the bridge as well as the actual bridge, though there is a limitation of the liability in s. 51 where the adjoining road is narrower than the width prescribed for the bridge by s. 50 of the Railways Clauses Act. In that case the bridge need not be wider than such road. It includes also all the works necessary for carrying the bridge over the railway. By the common law as defined by 22 Hen. 8, c. 5, and subsequent Acts, where the inhabitants are liable for the repair of a public bridge they are also liable for the repair of the highway as far as 300 feet from the bridge: *Rex* v. *West Riding of Yorkshire* (1); *Reg.* v. *Lincoln Corporation.* (2) In *Reg.* v. *Birmingham and Gloucester Ry. Co.* (3) the railway company was held bound to

(1) (1806) 7 East, 588: see Abbot of Combe's case there cited from the Year Book of Edward III., 43 Ass. pl. 37.
(2) (1838) 8 A. & E. 65.
(3) (1841) 2 Q. B. 47.

make the approaches as wide as the turnpike had been, and it was no answer to say that the road was equally convenient. To the same effect is *Nottingham County Council* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1) The approaches and the actual bridge form one construction; otherwise there might be only a narrow road of a few feet while the bridge was twenty-five feet.

P. O. Lawrence, K.C. (*Levett, K.C.*, and *J. G. Wood* with him), for the respondents. The question is wholly governed by the Railways Clauses Act and the special Act. Here the former Act applies and provides for the ascent and descent of the road—descent when the road goes under the line—and the company is responsible "for the immediate approaches and all other necessary works connected therewith." Sect. 50 deals with the approaches as being distinct from the bridge. By s. 51, where the road within fifty yards is less wide than the width prescribed for the bridge, the bridge need not be wider than the road. Thus there is a clear demarcation of responsibility between the approaches and the bridge. In *Reg.* v. *London and Bimingham Ry. Co.* (2) Lord Denman C.J. told the jury that the bridge did not include the approach.

It is noticeable that in the second proviso in s. 51 the words of the first proviso, "within fifty yards of the points of crossing the same," are not found. No case has been found where a railway company has been required to widen the approaches to a bridge

Upjohn, K.C., in reply. The "existing roads" in s. 51 are the roads which continue to be under the road authority, and the fifty yards are fifty yards of a road widened for railway purposes. In s. 50 the word "bridge" clearly includes approaches, and that section is the governing one, which is but qualified by the provisoes of s. 51. The meaning of "bridge" is the same throughout.

The House took time for consideration.

April 1. LORD LOREBURN L.C. My Lords, your Lordships have already disposed of the first point raised in the argument of

(1) (1894) 71 L. T. 430. (2) (1839) 1 Ry. & Ca. Cas. 317.

H. L. (E.) 1909

RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY.

Lord Loreburn L.C.

this appeal. The second point, now to be resolved, is whether the duty of widening a bridge imposed in certain contingencies upon a railway company by s. 51 of the Railways Clauses Act, 1845, relates to the entire structure erected to carry a road over a railway, or relates only to that part of it which actually crosses the railway line.

It is true that s. 51 is framed as a proviso upon preceding sections. But it is also true that the latter half of it, though in form a proviso, is in substance a fresh enactment, adding to and not merely qualifying that which goes before. So the question really turns upon s. 51 itself. It must be read in the light of what goes before and with a close regard to the purpose of the group of sections to which it belongs, namely, to provide for the dimensions of roads, and not for the dimensions of railway works except so far as they affect roads. It is very loosely expressed, and in order to be readily understood some explanatory words must be read into it deriving the sense from ss. 46, 49, and 50.

In s. 51 "roads within fifty yards of the points of crossing the same" must mean roads within fifty yards of the points where road and railway cross each other. The words preceding s. 46, and governing this group of sections, speak of "the crossing of roads," and, as ss. 46, 49, and 50 shew, relate both to the case where a railway is carried by a bridge over the road and to the case where the road is carried by a bridge over a railway. The term "crossing of roads" means the intersection of road and railway, either on a level crossing or by means of a bridge carrying either road or railway. Points of crossing mean points where the intersection begins.

So again in s. 51 "the width hereinbefore prescribed for bridges over or under the railway" must mean the width hereinbefore required for the road, whether over or under the railway, when there is a bridge. It cannot mean the width of the bridge on a cross section of the bridge where the railway is carried over the road by a bridge. Nothing in these sections concerns itself with the width of the railway bridge in that sense. Where the railway crosses the road on a bridge s. 49 requires that the "width of the arch" shall be

such as to leave thereunder a clear space of thirty-five, or twenty-five, or twelve feet for the road beneath. It is the width of the road which alone is aimed at, and a corresponding longitudinal width of arch is prescribed. On the other hand, s. 50 requires that where the road crosses the railway on a bridge the "road over the bridge" shall be thirty-five, or twenty-five, or twelve feet wide.

What s. 51 contemplates is the case of the road within fifty yards of the points of intersection being narrower than the width required to be provided for the road, whether it be by the span of the arch overhead or by the width of the bridge which carries the road over the railway. In other words, "width" in s. 51 means two things—either the width of the arch longitudinally, or the width of the road over the bridge, as the case may be.

So in s. 51 "the width of such bridges need not be greater than such average available width of such roads" means the width of the arch or the width of the road over the bridge, as the case may be, need not be greater than such average available width of such roads. The reasoning is the same as already explained.

So in s. 51, "so nevertheless that such bridges be not of less width in the case of a turnpike road or public carriage road than twenty feet," this must mean that such bridges give not less width for the road than twenty feet.

To put the point generally, so far as the first half of s. 51 is concerned, the purpose throughout is to provide for the width of the road, whether carried over or under the railway, and the elliptical language of the section, to have a meaning, must be so expanded.

If this be so, then the latter half of s. 51, which, by the use of the word "such," borrows the fuller language of the first half, must be also expanded in the same sense. "The average available width of any such road" means the average is to be taken of the fifty yards adjoining those points of intersection. "The width of such bridge" and "the width of the said bridge" mean the width of arch or of road over the bridge, as the case may be; and "the maximum width herein

H. L. (E.) 1909

RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY.

Lord Loreburn L.C.

or in the special Act prescribed for a bridge in the like case over or under the railway" means the greatest width which this or the special Act imposes, whether for arch, or for road over the railway, in the cases respectively of the railway being carried over the road, or the road over the railway, as the case may be.

Applying this, which seems to me the only construction practicable, the result in the present case will be as follows. Inasmuch as the road on one side adjoining the point of crossing, measuring the average for fifty yards from that point, has been increased in width since the construction of the railway beyond the width of such bridge (that is to say, the bridge actually intersecting the line and slopes or embankments thereof), the railway company are bound to increase the width of that bridge where it so actually intersects.

I will only add that, as already indicated, the word "bridge" in s. 51 means that part of the structure within the points of crossing or intersection. I think we are driven by the very framework of the section so to construe it. It is also used in the same sense, as contrasted with the immediate approaches, certainly in some parts of the other sections.

I am glad to know that all the judges who have heard this case agree with this view of the meaning of the word "bridge" in s. 51.

EARL OF HALSBURY. My Lords, I am unable to resist the conclusion to which the Lord Chancellor's reasoning has brought me. Confining myself, and intending to confine myself, simply to the question with which the Lord Chancellor has dealt, namely, whether the word "bridge" in s. 51 is to be construed as he has construed it, I agree; I think it must be so construed.

I do not think it right or desirable to add anything which might give rise to further litigation between the parties. There has been an old controversy from Magna Charta downwards as to the divided responsibility where bridge and road and road and bridge come together, and how much of the bridge forms part of the road so as to throw upon other authorities the responsibility of repair, which was supposed to be settled by the Act of

Henry VIII., which fixed a distance of 300 feet from the end of the bridge and settled the responsibility for such part of the roadway as was 300 feet from the end of the bridge. But, be that as it may, all I at present wish to say is that I absolutely confine my judgment at all events to that question which the Lord Chancellor has dealt with, namely, the use of the word "bridge" in s. 51. I think it is impossible to resist what he has pointed out is the meaning of it in that section, and so far I am prepared to agree with the judgment he has proposed. As to the consequences that may follow from it, as I have said, I do not think it is desirable to say anything more than that I am satisfied that that is the true construction of the word "bridge" as used in s. 51.

LORD ASHBOURNE. My Lords, I agree with my noble and learned friend on the woolsack.

LORD MACNAGHTEN. My Lords, your Lordships have already decided that the rights and liabilities of the parties to this controversy must be governed by the Railways Clauses Consolidation Act, 1845, and that consequently the bridge which is the subject of the present litigation must be widened. So far the district council has succeeded. But there remains the more important and more difficult point as to the extent of the obligation imposed on the railway company. That depends on the question, What is the meaning of the word "bridge" in s. 51 of the Railways Clauses Consolidation Act?

Speaking for myself, I rather hesitate to join in the strictures which have been passed on the wording of the section now under consideration. The language is compendious, no doubt; possibly it might have seemed less obscure if brevity had been studied less. But, after all, the meaning is tolerably plain. The difficulty, such as it is, comes, I think, from the circumstance that the draftsman had in his mind the state of things at two different periods of time. There was the state of things when the Bill for the company's special Act was pending in Parliament, and there was the state of things that would be brought about by the completion of the railway. The draftsman deals with them

H. L. (E.) 1909 RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY. Lord Macnaghten.

both in the same breath. The section speaks of "existing roads" and "the points of crossing the same," using the plural "points" because the roads are spoken of in the plural, for when the Act speaks of a road in the singular, as it does in the next section (s. 52), it speaks of "the point of crossing the same." The point of crossing is, I think, the point on the delineated plan where the line of the intended railway is drawn across the road. Then, although a road crossing the line of the railway may be altered or diverted, or a new road may be substituted for an old one, it speaks of "such road" as if it were identically the same road as existed before the railway was made.

Now it seems to me that in the whole of this group of sections headed by the words "With respect to the crossing of roads or other interference therewith" there is no single instance where the word "bridge" is used to mean anything but the structure which spans the road, or the structure which spans the line of the railway, as the case may be—the bridge proper, as it has been called for the sake of convenience.

The sections which mention bridges are ss. 46, 49, 50, and 51. Sect. 46 speaks of the bridge "with the immediate approaches and all other necessary works connected therewith," shewing that the word "bridge" was not intended to mean anything more there than the bridge proper. Sect. 49, dealing with bridges to be erected for the purpose of carrying the railway over roads, requires that the width of the arch of the bridge should be such as to leave a clear space thereunder of prescribed width, shewing again that the section was only dealing with the span of the bridge over the road. Sect. 50 requires that when a road is to be carried over the railway it is to have a clear space of prescribed dimensions "between the fences thereof." "The fences thereof" are the fences "on each side of the bridge," which are to be four feet high. That again is the bridge proper, for the fences "on each side of the immediate approaches of such bridge" are of a different height. They are not required to be more than three feet high.

When we come to s. 51 reference is made to the width already "prescribed for bridges over or under the railway." And then follows the provision which requires the company to increase the

width of a bridge in case, after the construction of the railway, the average available width for the passing of carriages of the road within fifty yards of the point of crossing the railway is increased on either side thereof beyond the width of the bridge. Reading all these sections together, I think it is plain that the width of the bridge in that provision must mean the width of the bridge proper.

Several cases were referred to in the argument. The one which throws most light upon the point in controversy is the case of *Reg.* v. *Birmingham and Gloucester Ry. Co.* (1) That was also a contest between a railway company and a road authority. But in that contest, curiously enough, the position of the parties in argument was reversed. The railway company under their Act, which was passed in 1836 and contained sections identical with those in the Taff Vale Act of the same year, had made a road in substitution for one which existed at the time when they obtained their Act, but they had made it of less width than the old road. They contended that as they had made it of the width prescribed for a "bridge" they had done all they were required to do; the approaches, they said, were part of the bridge.

In delivering the judgment of the Court Lord Denman C.J. said this: "The question is whether a mandamus lies to this company directing them to restore a turnpike road carried over a railway to its former width. Prima facie they are bound to make the road so lifted over the railway as wide as it was before, though there is a provision that the bridge in such a case shall be fifteen feet wide, dispensing no doubt with any greater width in that part. But we are clearly of opinion that the maximum is confined to that part of the road which can strictly be called the bridge, and can by no means import into this case the doctrine laid down with an entirely different object that the approaches to a bridge form a part of it, by which the road might be narrowed to a great extent beyond the bridge on either side."

I am of opinion that the railway company are right on this

(1) Mentioned in a note at p. 51 of the report of the same case at a later stage in 2 Q. B. 47.

H. L. (E.) 1909 RHONDDA URBAN COUNCIL v. TAFF VALE RAILWAY.

point and that the judgment of Phillimore J. should be restored, but without costs, and that, as the district council has succeeded in part and failed in part, there ought to be no costs of this litigation either here or below.

Order of the Court of Appeal reversed and order of Phillimore J. restored except as regards the costs; each party to bear their own costs here and below.

Lords' Journals, April 1, 1909.

Solicitors: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd; Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

[HOUSE OF LORDS.]

H. L. (E.) 1909 *April* 1.

THORNTON URBAN DISTRICT COUNCIL . APPELLANTS;

AND

BLACKPOOL AND FLEETWOOD TRAM-ROAD COMPANY . . . . . } RESPONDENTS.

Local Government—General District Rate — Assessment — Tramroad — Land "used only as a railway constructed under any Act of Parliament" — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

Where a tramroad has been constructed by a tramroad company under an Act of Parliament upon the company's land and the tramroad is in fact a railway and is used only as a railway constructed under an Act of Parliament for public conveyance, the company is entitled to be assessed in respect of the railway at one-fourth of its net annual value by virtue of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875.

Decision of the Court of Appeal, [1907] 1 K. B. 568, affirmed.

THE material facts of this appeal are stated in Lord Macnaghten's judgment. The details will be found in the report of the decision of the Court of Appeal. The King's Bench Division (Lord Alverstone C.J., Lawrance and Ridley JJ.) held that the tramroad was not a railway within the meaning of the Public Health Act, 1875, s. 211. That decision was reversed

by the Court of Appeal. Hence this appeal by the district council.

March 8, 9. *Honoratus Lloyd, K.C.* (*J. D. Fitzgerald, K.C.*, and *Clease* with him), for the appellants. The respondents' undertaking is not "a railway constructed under the powers of any Act of Parliament for public conveyance," and therefore not entitled to the benefit of s. 211 of the Public Health Act, 1875. The word "tramroad" is properly applied where the lines are laid on private ground; "tramway" when they are laid on the public road. The respondents have not been incorporated by Parliament as a railway company. The tramroad is not governed by the general system of railway legislation and in many respects is subject to conditions which are inapplicable to a railway. It was therefore called a "tramroad"—a word which has not found its way into public legislation. A large number of sections of the Railway Clauses Act, 1845, invariably incorporated into railway Acts, have been carefully omitted from the respondents' Acts. Thus s. 6 and following sections dealing with construction; s. 15, with deviations; the group from s. 30 to s. 44, the taking and compensation of owners of land and other matters concerned with land; ss. 86 to 107, the carriage of goods and tolls, the rights of companies as common carriers and coach proprietors, and other matters, are omitted. Railway lines do not constitute a railway, and lines laid down under statutory powers by the Mersey Docks and Harbour Board and used by the London and North Western Railway Company were held in *Williams* v. *London and North Western Ry. Co.* (1) not to be a railway within s. 211: see per A. L. Smith L.J. Many crossings are authorized on behalf of landowners "for the development of their estates" which in a railway proper would have to be fenced.

The extent of the exemption in the case of railways and the reason for it are stated in *South Wales Ry. Co.* v. *Swansea Local Board.* (2) The reason is that railway companies do not derive the same benefit from the rates as ordinary occupiers. But the reason is not applicable to such undertakings as the

(1) [1900] 1 Q. B. 760, 767. (2) (1854) 4 E. & B. 189.

H. L. (E.) 1909

THORNTON URBAN COUNCIL v. BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY.

respondents' which have come into existence since that time: see also *Newport Dock Co.* v. *Newport Board.* (1) *Wakefield Corporation* v. *Wakefield and District Light Ry. Co.* (2) was under the Light Railways Act, 1896, and is inapplicable, as it cannot be held here, as it was in that case, that the land is used "only as a railway." It is true that passenger duty, rightly or wrongly, was demanded by the Inland Revenue authorities; but the respondents are not a railway under the Notice of Accidents and other Acts. In any case the quarter sessions have held as a question of fact that the respondents are not owners of a railway, and the superior Courts were bound by that finding.

Danckwerts, K.C. (*C. C. Hutchinson* with him), for the respondents. The word "railway" is a generic term, and of the genus there are several species. It is used in its generic and comprehensive meaning in the Act of 1875. It was so used by Parke B. in *Bishop* v. *North* (3), where under an Act of 32 George III. any proprietor of coal mines in a county might make "any railways or roads." The test is that of construction under parliamentary powers: *North Eastern Ry. Co.* v. *Leadgate Local Board* (4), where a railway originally constructed without such powers, but subsequently acquired by the North Eastern Railway Company, was held not to be entitled to the exemption granted by the Public Health Act, 1858. Tramways, tramroads, light railways are all species of the same genus. The definition given by A. L. Smith L.J. in *Williams* v. *London and North Western Ry. Co.* (5) covers the respondents' tramway: "A railway in the ordinary sense, that is a line of rails connecting one place with another, over which goods and passengers are carried, and not," he adds, "such rails as those within these four walls." The Railways Clauses Act, 1845, applies to "every railway which shall by any Act which shall hereafter be passed be authorized to be constructed . . . . and all the provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby." The argument, therefore, that some clauses of the Act of 1845 are

(1) (1862) 2 B. & S. 708.
(2) [1908] A. C. 293.
(3) (1843) 11 M. & W. 418; 12 L. J. (Ex.) 362.
(4) (1870) L. R. 5 Q. B. 157.
(5) [1900] 1 Q. B. 760.

not incorporated has no force. The decision of this House in the *Wakefield Case* (1) is conclusive.

Lloyd, K.C., in reply.

The House took time for consideration.

April 1. LORD MACNAGHTEN. My Lords, I think this case may be disposed of in a very few words.

The only question is whether the land in the urban district of Thornton in respect of which the Blackpool and Fleetwood Tramroad Company are rateable is to be rated on the higher or on the lower scale.

Under s. 211 of the Public Health Act, 1875, the company are entitled to the benefit of the lower scale if the land in question is "used only" "as a railway constructed under the powers of" an "Act of Parliament for public conveyance." Now it cannot be denied that the rails on which the tramcars run, with the embankment or foundation on which they rest, and everything that supports them, do form a road or way, and that that road or way was constructed under parliamentary powers for public conveyance. Is it "a railway"? There is nothing in the Public Health Act, 1875, or in the earlier Acts, in which the same provision is found, to confine the word "railway" as used in those Acts to a particular kind of railway, or to limit the generality of the expression in any way. The cases in the Court of Queen's Bench—*South Wales Ry. Co.* v. *Swansea Local Board* (2); *Reg.* v. *Birmingham Waterworks* (3); *Newport Dock Co.* v. *Newport Board* (4)—which were cited during the argument shew, I think, that the question is, What is the thing according to common understanding? How would it be described in ordinary parlance?

It seems to me that if ever there was a case to which the maxim res ipsa loquitur may properly be applied it is the case now before your Lordships. Would anybody, seeing this road or way, or the photographs of it, which are in evidence, call it anything but a railway? I observe that Buckley L.J., who

(1) [1908] A. C. 293.
(2) 4 E. & B. 189.
(3) (1861) 1 B. & S. 84.
(4) 2 B. & S. 708.

H. L. (E.) 1909

THORNTON URBAN COUNCIL v. BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY.

Lord Macnaghten.

did not altogether agree with his colleagues, says: "It is the fact . . . . that this tramroad as used differs in no material particular from a railway to which the Railway Acts apply." It seems to me that if it is a railway in fact, not differing from other railways in any material particular, it is none the less a railway because the promoters in their special Act chose to call it a "tramroad"—a very convenient term to use for the title of their Act and the name under which they sought incorporation. Nor is it the less a railway because some only of the sections of the Railways Clauses Consolidation Act are incorporated in the special Act, or because, if one did not know what the thing really was, the language used for the purpose of applying the sections which are incorporated might seem to import that it was not, properly speaking, a railway at all. You must look at the special Act to see that it confers the appropriate powers of construction. Everything else in the Act is, I think, beside the question which this House has now to determine.

I think the appeal should be dismissed with costs.

LORD LOREBURN L.C. and LORD ASHBOURNE concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 1, 1909.

Solicitors: *Lees & Co., for F. W. Wood, Fleetwood; Chester, Broome & Griffithes, for Sutton, Elliott, Turnbull & Mayne, Manchester.*

[HOUSE OF LORDS.]

H. L. (E.)
1909
April 2.

POSTMASTER-GENERAL . . . . . APPELLANT;

AND

NATIONAL TELEPHONE COMPANY, LIMITED . . . . . } RESPONDENTS.

Telegraph—Telephone—Postmaster-General—Monopoly—Private Lines—Telegraph Act, 1869 (32 & 33 *Vict. c.* 73), *s.* 5.

Private telegraph or telephone lines of the A to A class, such as lines from a merchant's office to his private house, or from a head to a branch office, fall within s. 5 of the Telegraph Act, 1869, and are therefore excepted from the Postmaster-General's monopoly, but private lines of the A to B class, namely, lines connecting two or more separate and independent persons or business, are not within the exception.

Unlicensed electric signals (where no telephone is used) of the kind described in the second schedule to the special case are not excepted from the Postmaster-General's monopoly.

Decision of the Court of Appeal, [1908] 2 Ch. 172, reversed, and decision of Swinfen Eady J., [1907] 1 Ch. 621, restored.

THE facts contained in the special case are set forth in both the reports below.

March 22. *Sir W. S. Robson, A.-G.* (*Sir S. T. Evans, S.-G.*, and *Casserley* with him), for the appellant. The question depends on the meaning and effect of certain sections in the Telegraph Act, 1869. The fourth paragraph of the preamble recites that the same exclusive privilege should, "in order to protect the public revenue" as in respect of conveying letters, "be enacted with reference to the transmission of public telegraphic messages." Sect. 3 contains definitions of terms and s. 4 creates the monopoly—"the exclusive privilege of transmitting telegrams within the United Kingdom of Great Britain and Ireland" for money or other consideration. The section here in controversy is the fifth, which contains the exceptions "from the said exclusive privileges of the Postmaster-General." It is important to notice that in the first two paragraphs of the exceptions the singular number is used—"Telegrams . . . . transmitted by a telegraph maintained or used solely for private

H. L. (E.) 1909

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

use, and relating to the business or private affairs of the owner thereof." The second is, "Telegrams transmitted by a telegraph maintained for the private use of a corporation, company or person, in respect of which . . . . no money or valuable consideration shall be or promised to be made or given." If the plural number had been used the monopoly would have been destroyed. There must be one person or one corporation, not an aggregate. Otherwise there might be an unrestricted corporation of persons and societies, as in insurance. The construction contended for is that which was adopted in *Attorney-General* v. *Edison Telephone Co. of London* (1) and was accepted by the respondents down to 1897.

Next, the words "private use" mean that the use must be private to the single owner, whether person or corporation—that it must be from A. to A. It is not open for A. to make bargains with B. and others for business purposes. A doctor, for example, may communicate with a patient, but not with a chemist for the supply of medicine for the patient. The latter would constitute two businesses and would not be for the "private use" of the doctor. The words are restrictive, but not prohibitive, and it is not intended that the casual and gratuitous use of the private wire should be excluded.

[LORD LOREBURN L.C. In the first paragraph the words are "maintained or used"; in the second "maintained" only.]

That strengthens the appellant's case. Under both paragraphs the use must be "private." In the first schedule the example is a fire alarm system consisting of special boxes placed in the street by a municipal corporation and telephonic apparatus supplied by the respondent company. Keys are supplied to the police and also to householders, in some cases free of charge, in others for yearly payments. There are 264 keys supplied. How can this be described as for the "private" use of the owner, or as an A to A telephone?

The second schedule deals with signals where no telephone is employed. By s. 3 of the Act of 1869 the word "telegraph" is to include "any apparatus for transmitting messages . . . . by means of electric signals." These signals are therefore within

(1) (1880) 6 Q. B. D. 244.

the Postmaster-General's monopoly, and they are of the class A to B, though the respondents contend that any one can use them without a licence or payment.

On the respondents' contention s. 9, sub-s. 8, of the Telegraph Act, 1868 (31 & 32 Vict. c. 110), which enables railway companies to erect private wires "for the transaction of private business only," for the use of which there is to be "no money payment," was not necessary. With respect to all these A to B messages, whether by telephone or signal, the Postmaster-General has the monopoly, both by statute and the contract.

Sir Robert Finlay, K.C., and *Danckwerts, K.C.* (*Gaine* with them), for the respondents. Under the licence the respondents are to pay only for telephone lines which are within the Postmaster-General's monopoly. The words in s. 5 of the Act of 1869 "relating to the business or private affairs of the owner" apply to the word "telegrams," whereas the words "solely for private use" relate to "telegraph." The conditions are that no charge be made for the messages so sent and that they must relate to "private affairs." The exemption must include A to B, for no charge would be possible for A to A messages. The word "private" must not be unduly narrowed as the appellant narrows it. The words are "business or private affairs of the owner," and "private" is not applied to "business." A message sent by another on the owner's business comes within the exemption. There is no force in the argument based on the use of the singular number. The question is simply who maintains the wire. It is said to be possible for Keith, Prowse & Co. to bring about communication between one hotel and another and one theatre and another. In fact they never do, and if they did it would be a breach of clause 7 of the agreement: see Moulton L.J.'s judgment ad fin. The signals in the second schedule are clearly not within the monopoly. They are not telegrams at all; they are not messages. If they were, every house bell rung would be an infringement of the Postmaster-General's monopoly.

Sir W. S. Robson, A.-G., in reply.

The House took time for consideration.

H. L. (E.) 1909

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

April 2. LORD LOREBURN L.C. My Lords, with the utmost respect for the Court of Appeal I am unable to accept their view.

This appeal affords an admirable illustration of the danger to which great interests in this country are exposed by the slovenly manner in which even public Acts of Parliament are expressed. It is still worse with private Acts. In the present case the Government bought the telegraphs and acquired a monopoly of telegraphic, which includes telephonic, communication about forty years ago for a great sum of money; and to-day your Lordships have to consider how far that monopoly extends, not in regard to trivial or frivolous invasions, but in regard to claims so far-reaching that, if admitted, they would go a considerable way towards destroying the value of the monopoly itself, and so serious as to have been admitted by the Court of Appeal.

Speaking generally, not with complete precision, the National Telephone Company allege that the statutory monopoly of the Postmaster-General is limited by s. 5 of the Telegraph Act, 1869, so that any person (corporate or individual) may without licence use his own private wire to communicate with any other persons, however numerous, provided the message relates to his own business and is transmitted without charge. On the other hand, the Postmaster-General says that such a private wire can only be used by its owner to transmit messages to and from himself and his own servants and agents, except for occasional gratuitous use by others of an exceptional kind. The point is conveniently, though roughly, expressed in the question, May a person use his private wire to send A to A messages (that is from himself to himself), or can he also use it to send A to B messages?

Which of these views is sound must depend upon the true meaning of two paragraphs in s. 5 of the Act of 1869, which undoubtedly create exceptions to the monopoly granted by the preceding section. I propose to consider each paragraph separately.

The first paragraph excepts from the monopoly "Telegrams in respect of the transmission of which no charge is made, transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of the owner thereof." Here are laid down definite conditions under which

alone this exception applies. No charge must be made by the owner of the "telegraph" for transmitting a message. The message must relate to his own business, though, of course, it may also relate to the business of other people. And, finally, the telegraph must be maintained or used solely for the owner's private use. The singular is employed. It is one owner, not several; one personality, whether corporate or not.

I think this means that the owner alone can use the telegraph. It cannot be said to be used solely for his private use if the wire is at the owner's office at one end, and at the other end, or at a multitude of places throughout its length, it is at the offices of other people also, who are not his agents or servants. In that case it is used not solely for the owner's private use, but also for that of others.

The main argument of the respondents was that, if that be the sound construction, there was no need for saying that no charge should be made, for no one would charge himself. I cannot appreciate this argument. A message may be sent by A. to his own agent relating to his own business, and may also relate to B.'s business, and B. may be willing to pay something for getting the message sent and the answer communicated to him. That is the reason for prohibiting any charge being made.

I come now to the second paragraph, which excepts "Telegrams transmitted by a telegraph maintained for the private use of a corporation, company or person, and in respect of which, or of the collection receipt and transmission or delivery of which no money or valuable consideration shall be or promised to be made or given."

This paragraph is differently worded because it deals with a different case. Here there is no condition that the message must relate to the owner's business. Here also it is not imperative that the "telegraph" shall be "maintained or used" solely for the owner's private use. It is enough that it is maintained for the private use of the corporation, company, or person and no charge made. It seems to me that the design was to allow a third person to use the telegraph, and to use it for business in which the corporation, company, or person had no concern, provided that the message was sent gratuitously and that the telegraph

H. L. (E.) 1909

POSTMASTER-GENERAL v. NATIONAL TELEPHONE COMPANY, LIMITED.

Lord Loreburn L.C.

was maintained for the private use of the corporation, company, or person. In other words, if the real purpose of maintaining the telegraph was for that private use, outside persons might be allowed to use it for their own affairs, always on terms of no charge being made. The Attorney-General described this as a casual and gratuitous use. I think he is right. If the practice were frequent, then the privilege would be destroyed, for then it might truly be said that the wire was not maintained for the private use of the corporation, company, or person only, but for the use of other persons also.

The language of both paragraphs is clumsy, and the two are not mutually exclusive. But in substance the later is a qualification of the earlier, intended to allow a certain degree of latitude. There may be an occasional invasion of the monopoly, but it must not be a practice.

This concludes the case in favour of the appellant. I need not, therefore, deal with the Attorney-General's second contention, that, under the agreement, the National Telephone Company are bound to pay the disputed royalties, quite apart from the statute. In my opinion the agreement, in this particular, merely licenses what would without licence be prohibited by the statute.

A point was made that the transmission of a signal, as described in the second schedule, does not amount to the transmission of a telegram within the Act of 1869. I think the point is untenable, in view of the definition clause.

EARL OF HALSBURY. My Lords, I entirely concur with the judgment of the Lord Chancellor and with the reasons on which it is founded.

LORDS MACNAGHTEN, COLLINS, and GORELL concurred.

Order of the Court of Appeal reversed with costs here and below. The first question to be answered by saying that the defendants are accountable as prayed; the second question to be answered in the affirmative.

Lords' Journals, April 2, 1909.

Solicitors: *Solicitor, Post Office; William E. Hart.*

[HOUSE OF LORDS.]

H. L. (E.)
1908
Nov. 12.

EDWARDS AND OTHERS . . . . . APPELLANTS;

AND

EDWARDS AND OTHERS . . . . . RESPONDENTS.

Will—Construction—Perpetuity—Executory Limitation—Contingency—Remoteness.

A testator by will devised realty to his two sons as tenants in common in fee simple with a direction in a codicil to his sons and their heirs to make to each of his daughters for life "and afterwards to and amongst the children of each and their heirs" certain payments out of the royalties or out of the dead rent payable out of the coal under a specified farm and any other coal under any other land of the testator's when worked or let:—

Held, that upon the true construction of the codicil the testator intended to create executory limitations in land to arise at some future and indefinite period on a contingency which might or might not happen, and that the direction was void for remoteness so far as related to the testator's grandchildren.

Decision of Court of Appeal (not reported) affirmed.

London and South Western Ry. Co. v. *Gomm*, (1882) 20 Ch. D. 562, 580, approved upon this point.

JOHN EDWARDS by a will made in 1870 devised all his real estate to his two sons, and by a codicil of August, 1874, directed his "sons their heirs and assigns to pay to each of my daughters for her life and afterwards to and amongst the children of each and their heirs one penny per ton out of the royalty in respect of coal under Gellia Gwellt Issa farm and any other coal under any other land of mine when the same is worked or let and one equal eighth part of any dead rent payable in respect of any such coal in case the same shall be let and there shall be no working of coal or no sufficient working at any time to cover the dead rent."

The testator died in 1878, and after his death some of his daughters died, leaving children. The question in this appeal arose under an originating summons as to the validity of the direction in the codicil so far as related to the right of the testator's grandchildren to payments in respect of coal under a

H. L. (E.) 1908 EDWARDS v. EDWARDS.

mining lease granted after the testator's death. The Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.), affirming Kekewich J. upon this point, held that the direction was void.

1908. June 30, July 3. *Upjohn, K.C.*, and *Alfred Adams*, for the appellants.

Levett, K.C., P. O. Lawrence, K.C., and *G. E. Cruickshank*, for the respondents.

In addition to *London and South Western Ry. Co.* v. *Gomm* (1) the following cases were discussed: *Gilbertson* v. *Richards* (2); *Birmingham Canal Co.* v. *Cartwright* (3); *Morgan* v. *Davey*. (4)

The House took time for consideration.

Nov. 12. LORD MACNAGHTEN. My Lords, I think the appeal fails.

The first and indeed the only question for consideration is this: What interests did the testator intend to give to the children of his three daughters by the limitations contained in the codicil to his will? There is no controversy about the will itself or about the interests of the daughters. Two of the daughters are dead. Their interests have expired. The third is still living. Her interest was not put in question in these proceedings, and it is expressly saved by the order under appeal. The only point is whether the directions in the codicil intended to take effect after the expiration of the life estates of the daughters are valid or not. The meaning of the testator is, I think, plain enough. His two sons were to be owners of all his real estate as tenants in common in fee simple. That is what the will says. No one else was to have any present interest in the real estate. But the testator was minded to impose upon his "sons their heirs and assigns" the obligation of making certain payments to each of his daughters for life, "and afterwards to and amongst the children of each and their heirs," out of the royalties or out of the dead rents as the case might be,

(1) 20 Ch. D. 562, 580.
(2) (1859) 4 H. & N. 277, 297.
(3) (1879) 11 Ch. D. 421.
(4) (1883) Cab. & E. 114.

payable in respect of coal under a certain farm specified in the codicil and any other coal under any other land of his when worked or let. Now the coal the lease of which has given rise to this question was not being worked or let in the testator's lifetime, and there was no certainty that it ever would be either let or worked.

What then is the meaning of the codicil construed (as the Court is bound to construe it) just as if the rule against perpetuities did not exist, and as if the dispositions contained in the codicil, whatever their legal effect may really be, were good and valid in law? It seems to me that the intention of the testator was plain. He intended to create executory limitations in land to arise at some future and indefinite period on a contingency which might or might not happen, and to impose on the land a fetter or burthen of indefinite duration which the owners for the time being, the devisees of the testator, or the persons deriving title under them could not get rid of without the consent and concurrence of the persons entitled to such executory interests. Now, if that is the fair meaning of the language which the testator has used,—and it seems to me that no other meaning can be got out of the words of the codicil,—it cannot, I think, be doubted that the disposition in question offends against the well-known rule and must be held void for remoteness. The law is stated very clearly by Sir George Jessel M.R. in *London and South Western Ry. Co.* v. *Gomm.* (1)

I am not so much impressed by the circumstance that the testator had in contemplation two alternatives—a penny per ton in one event, and one eighth of the dead rent in another event. Nor am I disposed to agree with the observation of one of the learned judges of the Court of Appeal, that "the difficulty is caused really by the penny per ton." I think the difficulty in the way of the appellants would have been just the same if nothing had been said about a penny per ton.

I think the appeal must be dismissed.

LORD LOREBURN L.C. My Lords, I agree with the judgment of my noble and learned friend Lord Macnaghten; and I am asked by

(1) 20 Ch. D. 562, 580.

H. L. (E.) 1908 EDWARDS v. EDWARDS.

my noble and learned friends Lord Halsbury and Lord Dunedin to express their concurrence also.

Order of the Court of Appeal affirmed and appeal dismissed; the costs of both parties in this appeal to be paid out of the residue of the testator's estate.

Lords' Journals, November 12, 1908.

Solicitors: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare; Schultz & Son, for Gwilym James, Charles & Davies, Merthyr Tydvil.*

H. L. (Sc.) 1909 *March* 26.

[HOUSE OF LORDS.] *Applied.* DBCD. *In re R.*, [1951] P. 10

WILLIAM LOW AND ANOTHER (PAUPERS) . . APPELLANTS;

AND

JAMES GUTHRIE AND OTHERS . . . . . RESPONDENTS.

Will—Reduction—Agent alleged to benefit under Will prepared by him—Suspicion—Defect in Attestation—Scottish Law.

The rule that where a will is prepared by a party who takes a benefit under it, that is a circumstance which forms a just ground of suspicion and requires clear and satisfactory proof that the instrument contains the real intention of the testator, does not authorize the Court to consider suggestions of fraud or undue influence of which no foundation is laid in evidence.

APPEAL from the First Division of the Court of Session, Scotland. (1) The appellants were William and David Low, sons of the testator William Low. The respondents were James Guthrie, bank agent, Brechin, Scotland, and David Spence, trustees and executors, and others. William Low the testator died at Brechin on March 9, 1893. He had been married in 1843. Of this marriage there were born three sons, William, James, and David. In 1851 the testator was sentenced to twelve months' imprisonment for assault, and while he was in prison his wife

(1) (1907) S. C. 1240.

sailed for America with her three children in company with a certain William Forrest, with whom she afterwards lived in America as his wife. Her children were brought up in America under the name of Forrest and were ignorant of their true parentage till 1904, eleven years after the testator's death. The mother predeceased the testator. The testator's will (which was not holograph of the testator) was executed on January 24, 1893, about seven weeks before his death. It nominated James Guthrie and David Spence sole trustees and executors and residuary legatees and bequeathed to them the testator's whole means, but subject to the payments of legacies amounting in all to 190*l.* The appellants sought to have the will set aside on two grounds—first, that the will was not validly executed by reason that a Mrs. Jane Lyall, one of the testamentary witnesses, neither saw the testator sign nor had his signature acknowledged to her by him; secondly, that the will was executed under essential error induced by Mr. Guthrie or otherwise was obtained by him from the testator when the latter was in a facile condition by fraud and circumvention. The appellants also asked alternatively for an account with a view to payment of legitim, but this latter point was in abeyance. The first point was abandoned at the Bar, and at the same time all questions of fraud were abandoned. It appeared that the testator had a sum of about 506*l.* on deposit receipts and that he had a house at Brechin of the value of about 280*l.* About the date of the will the testator was suffering from a most painful disease, and he sent for Mr. Guthrie, and shortly afterwards the deposit receipts were cashed (December 27, 1892) and produced 506*l.* Mr. Guthrie's explanation was that the testator wanted his will made; that knowing himself to be dying he was determined to give away without the publicity of a will a large proportion of his means, partly because he would not have it known what friends he was favouring, and partly because he had possible claimants (his children) to his succession; that part of his means he was willing pro forma to put through the medium of a will because destined to his relatives and not merely to his friends. Mr. Guthrie also stated that the testator disposed of the proceeds of the deposit receipts, all but 350*l.*, in a manner only known to

H. L. (Sc.) 1909 LOW v. GUTHRIE.

himself. The remaining 350*l.* was put by the testator's own hands in the beginning of January, 1893, into a series of envelopes (some of which were produced) which Mr. Guthrie had been directed to bring down, and which Mr. Guthrie addressed on his instructions and indorsed with the amounts they respectively contained. Some of the legacies contained in the will were included in the enclosures. These envelopes were put aside and retained by the testator for a fortnight and were then handed to Mr. Guthrie. The sums in these envelopes were not parted with by Mr. Guthrie until after the death of the testator. Mr. Guthrie also added that he had received verbal instructions that one Helen Eaton was to get the house, and he had paid her the interest of the money it produced. As regards the residue Mr. Guthrie stated that eventually, on alleged instructions from the testator, he alone was to get the residue, subject to any directions, verbal or otherwise, which the testator might subsequently give, though, as the testator had calculated pretty closely in his division by envelopes and by will, there was really no balance.

The Lord Ordinary (Lord Johnston) by interlocutor dated May 12, 1906, found that the appellants had proved they were two of the lawful children of the testator; that the will had not been truly attested by the testator in the presence of the witness Mrs. Jane Lyall in terms of the statute 1681, c. 5; that the testator retained his faculties to the end; but, although holding that Mr. Guthrie had acted with perfect honesty, the will fell to be reduced in terms of the conclusions of the summons.

On July 16, 1907, the First Division (Lords Kinnear, Pearson, and M'Laren) recalled the Lord Ordinary's interlocutor, holding that on the evidence the appellants had failed to prove their allegations that the will was not duly executed, and that on the whole matter the ground of reduction had completely failed; that there was no evidence that Mr. Guthrie made any kind of misrepresentation to the testator which could mislead him; and as to the benefit of the will to Mr. Guthrie, at the best the benefit he could procure under the will would be extremely small.

March 25, 26. *Constable, K.C.*, and *John Sanderson* (of the Scottish Bar), for the appellants. The decision of the First Division was erroneous, but the appellants do not now contend that the will was not properly attested. Nor do they rest the case for reduction on the ground of fraud, but they contend that the will did not express the testator's wishes, and that it was made under such suspicious circumstances, not sufficiently explained, that it must be reduced. There was a great improbability of the testator making Mr. Guthrie the recipient of verbal instructions, and there was no evidence that the testator ever expressed a desire to benefit Mr. Guthrie and Mr. Spence. The inventory of the movable estate was sworn at only 21*l.* 8*s.* 7*d.*, and the declarations of witnesses produced by Mr. Guthrie were inconsistent with other evidence. Mr. Guthrie alleged that he had no advantage from the will, and it cannot be proved that he had, but the burden of supporting his allegation is upon him. He derives a benefit under the language of the will. In the words of Parke B. in *Barry* v. *Butlin* (1), "If a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." That rule was approved by Lord Cairns in *Fulton* v. *Andrew* (2): see also *Parker* v. *Duncan* (3); *Tyrrell* v. *Painton* (4); *Finny* v. *Govett* (5); *Grieve* v. *Cunningham* (6); *Weir* v. *Grace.* (7) The rule of Parke B. applies here.

James A. Clyde, K.C., and *A. M. Hamilton* (of the Scottish Bar), for the respondents, were not called upon.

LORD LOREBURN L.C. My Lords, I should be very sorry if the rule adopted by Lord Cairns in *Fulton* v. *Andrew* (2) were

(1) (1838) 2 Moo. P. C. 480.
(2) (1875) L. R. 7 H. L. 448, 461.
(3) (1890) 62 L. T. 642.
(4) [1894] P. 151.
(5) (1908) 25 Times L. R. 186.
(6) (1869) 8 M. 317.
(7) (1899) 2 F. (H. L.) 30.

H. L. (Sc.) 1909 — LOW v. GUTHRIE. — Lord Loreburn L.C.

used as a screen behind which one man was to be at liberty to charge another with fraud or dishonesty without assuming the responsibility of making that charge in plain terms.

This case is a very peculiar one. A man named Low was living in Brechin. He had been separated from his wife and family for upwards of forty years. He made a disposition of his property with the assistance of Mr. Guthrie. I am quite persuaded that Mr. Guthrie was perfectly honest; he has been so found by the Lord Ordinary, and the Inner House has accepted that view, as I do. This gentleman made no profit for himself; he distributed the property according to the private trusts which had been orally conveyed to him, and after ten or eleven years the appellants, who were the sons of the testator, and who had never seen him, or did not even know him, come back and commence this litigation against Mr. Guthrie, bringing him up on veiled charges of dishonesty even to your Lordships' House. I think it is an unprincipled proceeding. In my opinion the case entirely fails. I will say nothing as to the claim to be made in regard to legitim, but I think that this appeal ought never to have been brought, and, being brought, ought to be dismissed with all the costs here and below which your Lordships are empowered to give.

LORD MACNAGHTEN. My Lords, I quite agree.

LORD JAMES OF HEREFORD. My Lords, in one sense it is unnecessary to say anything more than that I entirely concur with the judgment of the noble lord on the woolsack; but I think it is perhaps satisfactory to the defender and those who represent him in this case to know that there is no dissent whatever from the judgment given by the Court of Session.

My Lords, the judgment of your Lordships' House will in no way weaken that which is the basis of our law upon the subject of the making of a will by a person interested. A principle was laid down by Parke B. in *Barry* v. *Butlin* (1), which has been referred to, and upon which judgment, I think, all other subsequent decisions have been based. That only requires that, where a person is

(1) 2 Moo. P. C. 480.

interested, vigilance shall be exercised in seeing that the case, if he has to meet one, of undue influence is fully met or the knowledge of the testator is fully proved. It does not go further than that. There is no disqualification in the making of a will through a person who takes an interest having made it. Therefore all you have to do in this case is to vigilantly look and see whether there is any evidence that can shake the fact that the will was made. I have nothing more to say upon the subject. Except that I entirely agree with what was said by Lord Kinnear on that point: "Upon the whole evidence in the case I must say I am unable to see any shadow of evidence for charging Mr. Guthrie with undue influence, or, in other words, with fraud." I entirely agree with that view that there is no shadow of evidence to establish the appellants' case, and I am sure that your Lordships will support the motion of my noble and learned friend.

LORD DUNEDIN. My Lords, I agree with your Lordships. I think that Mr. Guthrie in acting in preparing the will was called upon to make explanation, but I think he has made ample and full explanation of the most satisfactory kind, and that all allegations of fraud or anything like it have failed. I should like to add that, although I concur with the Lord Chancellor in thinking that this case was scarcely one to bring to this House, I think the learned counsel for the appellants was quite right in the course which he took in abandoning the discussion upon the non-execution of the document, because I wish to say that I entirely agree with the judgment of the Inner House upon that point. It is not enough to set aside a probative deed in Scotland that one instrumentary witness simply says that he did not hear the signature acknowledged. That doctrine was upheld by your Lordships' House in the case of *Smith* v. *Bank of Scotland* (1), but I think the locus classicus in Scotland—and it is an authority which I think ought to have the authority of this House superinduced to it—is the judgment of Lord Mackenzie in *Cleland* v. *Cleland*. (2) There it is put in a single sentence by Lord Mackenzie where he says, "It is more important to observe that no intelligible account is given by

(1) (1813) 1 Dow. 272.

(2) (1838) 1 D. 254, 261.

H. L. (Sc.) 1909 LOW v. GUTHRIE.

them "—that is, the instrumentary witnesses—"why the fact which they now allege should be true." My Lords, I think that is the law, and I think that the learned counsel for the appellants was quite right in abandoning that part of the case.

LORD SHAW OF DUNFERMLINE. My Lords, I express my entire concurrence upon the point of the execution of the will with the judgment just delivered by Lord Dunedin.

As to the other matter in the case, which has been argued to us with such care by Mr. Constable, I desire to say that in my opinion there seems to be no substantial difference in the result arrived at by the laws of England and Scotland respectively. In the language of Parke B. in the case of *Barry* v. *Butlin* (1), the whole hypothesis of fact upon which such a question can arise is stated thus: "If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court." My Lords, in this case, in my opinion, having gone through the evidence, I do not think it to be established in point of fact that Mr. Guthrie has derived any benefit from this will. On the contrary, he was charged with responsible and irksome duties; and in my judgment he has discharged those duties fully and faithfully, and there is no atmosphere of suspicion, therefore, brought into the case to enable the doctrines governing such a situation to be applied here. Were Mr. Guthrie even to have obtained a fragmentary or doubtful advantage under this settlement, the whole question that would then arise is this,—Does the will, the document signed by Low, express (in the language of Parke B.) the true will of the deceased? It is the same proposition in a more ample form put by Lord Barcaple in *Grieve* v. *Cunningham* (2), namely, Was the document the free and uninfluenced act of the testator deliberately entertained and carried through with entire knowledge of its effect? In my opinion those questions, whether in the succinct or the more ample form, are answered in the affirmative in this case. With regard to the situation of Mr. Guthrie and the procedure in actions of this kind, I desire to express my entire concurrence with every

(1) 2 Moo. P. C. 480. (2) 8 M. 317.

word of the judgment which your Lordship has delivered from the woolsack.

LORD LOREBURN L.C. My Lords, I understand this is a pauper case on the part of the appellants, and your Lordships do not, under those circumstances, give any costs.

Ordered that the appeal be dismissed.

Lords' Journals, March 26, 1909.

Agents for appellants: *Townsend & Sharpe, for Kinmont & Maxwell, Edinburgh.*

Agents for respondents: *G. R. Thorne Robinson & Co., for Sharpe & Young, W.S., Edinburgh.*

[HOUSE OF LORDS.]

JAMES H. ROGER . . . . . APPELLANT;

AND

J. P. COCHRANE & CO. . . . . RESPONDENTS.

Patent—Interpretation of Specification—Infringement by Licensee—Damages.

The appellant was assignee of letters patent for an invention relating to an improvement in balls for use in the game of golf.

The specification set forth: "In carrying out my invention I substitute for the core hitherto used a core consisting of an incompressible fluid such as water or other liquid or semi-liquid contained in a suitable receptacle or shell made of elastic material. . . . . Any convenient incompressible fluid having no detrimental action on the receptacle such as water, treacle, glycerine or the like may be used to form the core, though in practice I have found that water gives very satisfactory results." And the first claim was for "a ball for use in the game of golf made with a core or nucleus of incompressible fluid forced into and contained within a receptacle of elastic material which, when expanded to the required size, is closed and thereafter wound round with rubber thread or tape substantially as hereinbefore described."

The respondents were the exclusive licensees from the patentee to manufacture for six years golf balls under the patent, which were called "Mingay" balls. These balls were a great success and large numbers were manufactured. Subsequently the respondents manufactured a ball called the "Ace," constructed mechanically in precisely the same way as the "Mingay" ball, but with a core consisting of 85 per cent.

H. L. (Sc.)
1909
ROGER
v.
J. P. COCHRANE & Co.

of water and 15 per cent. of gelatine. The appellant alleged that the "Ace" ball was an infringement of the specification and claimed damages:—

Held (reversing the decision of the First Division of the Court of Session), that the specification, which was a part of the respondents' contract of manufacture, included not merely liquids like water, but also sticky substances, and therefore the "Ace" balls were an infringement of the patent and the appellant was entitled to damages in lieu of royalty.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellant was James Henry Roger, who was the assignee of letters patent No. 20905 of 1905 granted to Frank Hedley Mingay for an invention relating to an improvement in golf balls. The respondents were J. P. Cochrane & Co., manufacturers of golf balls. They held an exclusive licence to manufacture golf balls under the above-mentioned patent in terms of an agreement entered into between them and the said Frank Hedley Mingay in April, 1906, by which the said licence was granted for six years; the balls to be stamped "Mingay's patent." Subsequent to this agreement the respondents manufactured a ball called the "Ace," the core of which consisted of gelatine and water. The appellant raised this action against the respondents and sought an interdict to prevent them from infringing the patent and for damages. In this action the validity of the patent was not called in question, and the only defence made by the respondents was that there had been no infringement.

The provisional specification set forth: "Under my invention I substitute for the core hitherto used a fluid core. . . . . Any suitable fluid may be used to form the core whilst the receptacle for the fluid may be made of any suitable flexible elastic or inelastic material." Then the complete specification contained this: "In carrying out my invention I substitute for the core hitherto used a core consisting of an incompressible fluid such as water or other liquid or semi-liquid contained in a suitable receptacle or shell made of elastic material. . . . . The usual rubber or other thread or tape is then wound in the customary

(1) (1907–1908) 25 Rep. Pat. Cas. 9, 757.

manner on the outer surface of the receptacle or shell, the substance contained in which owing to its fluid nature readily assumes during the winding process the spherical shape . . . . Any convenient incompressible fluid having no detrimental action on the receptacle such as water, treacle, glycerine or the like may be used to form the core or fill the receptacle or shell of the core, though in practice I have found that water gives very satisfactory results. . . . . When the rubber bag is expanded by the fluid it, of course, by its contractile action, presses on the fluid and thereby ensures, practically speaking, a solid although mobile core."

The first claim of the specification was for "a ball for use in the game of golf made with a core or nucleus of incompressible fluid forced into and contained within a receptacle of elastic material which, when expanded to the required size, is closed and thereafter wound round with rubber thread or tape substantially as hereinbefore described."

The essence of the patent therefore was the substitution of a liquid core for the solid core or core filled with compressible fluid, such as air, both of which were in common use at the date of the patent. The respondents maintained that they had not infringed the patent, because the core of the "Ace" ball which they manufactured was composed of a solid of the consistency of jelly, and they maintained that the patent was limited to a core consisting of an incompressible fluid, and did not cover a core filled with a substance which was not fluid in the sense that it did not flow at ordinary temperatures. As originally manufactured the Mingay ball had a core consisting of a single rubber bag into which water under some pressure had been forced. Under this pressure the rubber bag assumed a spherical shape, the bag was then closed, and the projecting orifice through which the fluid had been forced was cut off. Round this bag was wound rubber tape and thread until the core reached the desired dimensions, an operation which involved considerable pressure because of the rubber being wound under tension. The ball so made was at first very successful, over 14,000 dozen having been sold in the course of the first year.

The respondents alleged that after some months' experience of

H. L. (Sc.) 1909 ROGER v. J. P. COCHRANE & Co.

the Mingay ball so manufactured they had complaints that it was too lively in the short game, and it was suggested to them that a mixture of gelatine and water should be substituted for water. They believed that this mixture would form a jelly which would have the characteristic qualities of a solid, and they called the ball which they manufactured in this way the "Ace" ball. This ball also proved very successful, it being admitted that 20,010 dozen were sold in the course of the period from September 1, 1906, to September 30, 1907. Evidence was produced by the respondents that their instructions to their workmen were to the effect that 15 per cent. of gelatine should be mixed with 85 per cent. of water to form the alleged jelly enclosed in the bag forming the core of the "Ace" ball, but a considerable number of balls tested by the appellant's witnesses proved on analysis to have been made with a jelly consisting of as much as 94 per cent. of water. The same witnesses stated that after the lapse of some time—a few months—the jelly was liable to decompose and to become as fluid as water; and the Lord Ordinary found that the proportion of "Ace" balls tested and which were found to contain absolutely fluid matter was as much as 60 per cent. of the whole. In the manufacture of the "Ace" ball the mixture of gelatine and water was filled into the rubber bag under pressure in a liquid state at a temperature of about 120 degrees, but there was evidence that the temperature of 70 or 80 degrees would be sufficient to liquefy the contents even after they had been formed into a jelly. The parties agreed that 20,010 dozen "Ace" balls were sold down to the date of the trial, and the appellant restricted his claim for damages to the royalty which would have been payable on those balls had they been sold as "Mingay's" in terms of the licence, being the sum of 1500*l.* 15*s.*

On November 7, 1907, the Lord Ordinary (Lord Salvesen) (1) refused an interdict in respect that the respondents were licensees, but his Lordship held that the respondents were liable in damages in lieu of royalty on all "Ace" balls manufactured and sold by them at the rate per dozen agreed on for balls manufactured under the patent, and he gave decree for the 1500*l.* 15*s.*, being royalty at the rate of 1*s.* 6*d.* per dozen on the "Ace" balls

(1) (1907) 25 Rep. Pat. Cas. 9.

admittedly sold. Dealing with the construction of the specification, the Lord Ordinary said: "I think the words occurring at the end of the claim, 'substantially as hereinbefore described,' entitle the patentee to refer to the description in the specification, and it is plain from that description that when he uses the words 'incompressible fluid' he is speaking popularly, and from a practical point of view. The specific instances which he gives of such fluid are water, 'or other liquid or semi-liquid,' and again, 'water, treacle, glycerine, or the like.' There being here no question of the validity of the patent, the question therefore is, does the substance which the respondents employ come under any of these descriptions? It may be difficult to define what a 'semi-liquid' is, or at what point a substance ceases to be liquid and becomes solid; but from a popular point of view, I think a jelly consisting of from six to fifteen parts of gelatine and ninety-four to eighty-five parts of water, and which is forced out through any puncture of the bag by the pressure of the envelope in the form of a worm, which crumbles on the least pressure being applied to it, is just what popularly answers that description. It was admitted by the respondents' leading expert that for practical purposes this combination of gelatine and water might be treated as equally incompressible with water; and the behaviour, therefore, of the respondents' core at the time when the rubber tape and thread are wound round it cannot be distinguished from the behaviour of the liquid core. Nor does the evidence satisfy me that there is any substantial difference between the two balls in use; although it is possible that the 'Ace' ball, owing to the semi-liquid character of its core, does not exhibit the same lively qualities as the Mingay ball with the water core. Whether precisely the same result in practice might not be achieved by using some viscous liquid instead of jelly has not been tried, the respondents apparently being more anxious to avoid the patent than to improve on the original manufacture."

On July 14, 1908, the First Division of the Court of Session (1) recalled the Lord Ordinary's interlocutor and assoilzied the respondents from the conclusions of the summons.

(1) (1908) 25 Rep. Pat. Cas. 757.

H. L. (Sc.) 1909 ROGER v. J. P. COCHRANE & Co.

1909. May 10, 11. *Astbury, K.C.*, and *Condie Sandeman* (the latter of the Scottish Bar), for the appellant. The decision of the First Division was wrong and the Lord Ordinary's judgment ought to be restored. The evidence proved that the balls the respondents made as their own invention under the name of the "Ace" were filled with a mixture which was in the sense of the appellant's specification a liquid or fluid. It was the same invention and therefore an infringement.

Scott Dickson, D.F. (of the Scottish Bar), and *Norman Craig*, for the respondents. The respondents had not infringed the specification owned by the appellant, for what the patentee claimed was putting a fluid only into a bag, whereas the respondents put in a solid or at least a jelly. The respondents' mixture of gelatine and water was a different material, composed of different scientific properties, and therefore did not come within the patent. Moreover, the action of the jelly cored ball in play was different from the liquid cored ball, and the difference in action between the balls was due to the difference in core.

Condie Sandeman, in reply.

LORD LOREBURN L.C. My Lords, the dispute between the parties to this litigation came about as follows. A patentee obtained a patent for making golf balls with a core consisting of incompressible fluid. In his specification he exemplifies what is meant by "incompressible fluid," describing it as "such as water or other liquid or semi-liquid." Also he speaks of it as a substance "which owing to its fluid nature readily assumes during the winding process a spherical shape," and says that when enclosed in a rubber bag it is practically "a solid although mobile core."

Having patented this article, the patentee entered into an agreement with the defenders. The defenders thereby by agreement were constituted sole licensees for the sale and manufacture of these golf balls, called Mingay balls. They contracted to do their utmost to further their sale and were to sell them at 19*s.* a dozen. The patentee's instructions were to make the cores of water. For a little time the defenders made and sold water core or Mingay balls. Then they came, or at

all events say they came, to the conclusion that water cores made the ball too lively in the short game. They did not communicate with the patentee or with the pursuer—who was the assignee of all the rights under the patent—or try to make cores of a substance obviously within the specification, but on some one suggesting to them that gelatine and water in the proportion of fifteen to eighty-five would correct the excessive liveliness of the ball they adopted the idea. Instead of making Mingay balls, on which they must have paid royalty to the pursuer, they made "Ace" balls with a core of gelatine mixed with water and claim to pay no royalty at all. The "Ace" ball is sold at 18*s*. a dozen as contrasted with the 19*s*. which was to be charged for the Mingay.

My Lords, the main question is, Does a core composed of gelatine and water in the proportion of fifteen to eighty-five fall within the description of an "incompressible fluid"? As to the incompressibility, few things are in the strictest sense incompressible, but it is clear, and indeed not disputed, that the core of an "Ace" ball is practically incompressible. Is it then a fluid? There is no scientific definition of this word fluid. Nor is there in a popular sense any very precise meaning. Every one would say that it includes water. Probably opinions would differ if the question were asked as to a jelly so thin that it would melt if exposed to a temperature of seventy-four to eighty-four degrees. That is exactly the case with the core of an "Ace" ball.

Your Lordships have not, I think, to consider any niceties of etymology. Nor does any point arise here as to the validity of the patent or the certainty of its language for patent purposes. These parties have made a contract with reference to the manufacture of balls according to the specification, and that document has to be interpreted as if it were, as in substance it is, a part of their contract. I think it is clear that the specification, the relevant parts of which I have already referred to, meant to describe not merely liquids like water, but also sticky substances like treacle or glycerine. And when the object of the invention is regarded, that the impact of a golf club shall cause the pressure in the core to be distributed uniformly, this conclusion is supported. Accordingly I think that these balls were an

H. L. (Sc.) 1909 — ROGER v. J. P. COCHRANE & Co. — Lord Loreburn L.C.

infringement unless they come within the assignment, and are subject to the royalties.

I also think the pursuer has made good his case that in substance the core of the "Ace" balls was not really gelatinous, but for the most part absolutely fluid matter. The Lord Ordinary so finds as to 60 per cent. of the balls examined. I am content to accept his view, which is also my own. And I must add that nothing is more significant than the unsatisfactory character of the defenders' evidence on this point.

In my opinion the decision of the Lord Ordinary was right both as to liability and as to damages.

LORDS ASHBOURNE, JAMES OF HEREFORD, GORELL, and SHAW OF DUNFERMLINE concurred.

Ordered that the interlocutor of the First Division appealed from be reversed; that the interlocutor of Lord Salvesen be restored; and that the respondents pay to the appellant his costs both here and below.

Lords' Journals, May 11, 1909.

Agents for appellant: *Bristows, Cooke & Carpmael.*

Agents for respondents: *Edwin Herrin & Co., for W. & J. Burness, Edinburgh.*

[PRIVY COUNCIL.]

DOMINION COAL COMPANY, LIMITED . . DEFENDANTS;

AND

DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED . . . . . PLAINTIFFS.

J. C.*
1908
Dec. 1, 2, 3, 7.
1909
Feb. 11.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

CONSOLIDATED APPEAL AND CROSS-APPEAL.

Contract to deliver on specified Terms all the Coal required for use in the Plaintiffs' Works—Construction—Suitable for Plaintiffs' Works—Reasonably free from Stone and Shale—Breach of Contract—Damages—Specific Performance.

Under an agreement dated October 20, 1903, made between the appellant coal company and the respondent steel company (each theretofore well acquainted with the business of the other, and the character of the coal won) the former contracted to supply to the latter, on terms and conditions which were specified in great detail, "all the coal that the steel company may require for use in its works as hereinafter described," with the specific requirement that "all coal furnished shall be freshly mined and of the grade known as run-of-mine, reasonably free from stone and shale, and shall be supplied from such seams then being worked by the coal company as the steel company may designate." Other provisions imposed on the steel company the obligation to purchase all their coal from the coal company if the latter were ready to supply it, and gave the latter a preferential right to repurchase any excess delivery at less than the cost price. On November 9, 1906, the coal company notified to the steel company that the contract was at an end owing to their refusal to accept the coal furnished and to be furnished thereunder.

In a suit for a declaration that the coal company had no power to rescind, and for specific performance, or in the alternative for damages, the trial judge found, and their Lordships approved the finding—(1.) that the coal rejected was unfit for use by the steel company for its metallurgical purposes, i.e., the manufacture of steel, owing to the large quantity of sulphur it contained; (2.) that it was not reasonably free from stone and shale :—

Held that, on the true construction of the contract, "reasonably free from stone and shale" was irrespective of the method by which that result was obtained, and could not be so restricted as to mean as free

---

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

J. C.

1908

DOMINION COAL COMPANY, LIMITED v. DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED.

from stone and shale as it could be made by reasonable and proper picking, and nothing more.

Held, further, that the above obligation to supply related to coal suitable in character for the plaintiffs' works to the extent that the same could be obtained by the reasonable and proper working of their mines. Those works were enumerated in great detail, not, as the terms of the contract and surrounding circumstances shewed, for the purpose of measuring the quantity required, but of specifying precisely the uses to which the coal was to be put; and the provision as to repurchase was inexplicable in the case of unsuitable coal.

Held, further, that the plaintiffs were not entitled to specific performance, but, owing to the defendants' wrongful repudiation of the contract, to recover damages for the loss of it, in addition to all damages incurred before repudiation.

APPEAL from a judgment of the Supreme Court (January 7, 1908) affirming a judgment of Longley J. (without a jury) delivered September 16, 1907, and declaring the respondents entitled to damages for breach of contract, referring the damages for assessment, and ordering specific performance.

The contract is dated October 20, 1903, and is sufficiently set out in their Lordships' judgment. After various short deliveries by the appellants necessitating purchases elsewhere at higher than the contract rate, and rejections by the respondents of various carloads as unfit for use in their works, the appellants withdrew from the contract by a letter dated November 9, 1906, which is set out in the said judgment.

On December 8, 1906, the respondents brought their action, which, apart from the claim for the said short deliveries, was based on the appellants' withdrawal from the contract, for which withdrawal it was contended there was no proper ground. The judgments appealed from were to the effect that the coal rejected was wholly unfit for metallurgical purposes and could not be used by the steel company for coke-making or gas producers, and that if no other coal could be provided the plant would have to close; that it was not reasonably free from stone and shale; that the directors of the coal company were fully aware of the purposes for which the coal was to be supplied, and that the steel company had no intention of terminating the contract. From these judgments the appellants appealed on the ground that the action should have been dismissed; the respondents

cross-appealed on the ground that the coal rejected was not from the designated seams.

Danckwerts, K.C., Lafleur, K.C., C. S. Campbell, K.C., H. A. Lovett, K.C., and *J. D. Crawford*, for the appellants, contended that the judgment of the Supreme Court should be reversed and the action dismissed. In the events which had happened the question at issue was entirely one of the meaning of the language of the contract as applied to the position and circumstances of the parties. So judged, the steel company had refused to perform the contract as made, and the coal company was justified in withdrawing therefrom. Clause 3 specifically described the quality of coal which the appellants were bound to supply and the steel company was entitled to require. Clause 1 indicated the source of the supply, and the quantity to be thence supplied, by reference to the quantity required for use in the steel company's works named for that purpose in the clause, and the stipulated supply is to be on the terms and conditions thereinafter stated. Among the terms and conditions so referred to is clause 3, which carefully regulates the quality of the coal to be furnished to the steel company and gives the steel company the choice of the coal it wants, subject to the other descriptions in this clause, by enabling the steel company to select the seam or seams of coal at its own will from which the coal is to be taken. The steel company was not entitled to derive a warranty of fitness for steel-making from clause 1 of the contract. And, notwithstanding the diversity of the works named in their character and as regards the sort of coal required, the steel company have designated the Phelan seam at all times and no other, and have never differentiated the coal required in the statement of their requirements by reference to the respective works.

The contract did not entitle the steel company to more than a right to draw from the appellants' mines the quantity of coal it might require to be supplied subject to two conditions—first, the quantity was to be measured by the use thereof at defined works engaged in certain operations; secondly, the quality was to be such as might come from the appellants' mines and the seam

J. C. 1908 — DOMINION COAL COMPANY, LIMITED v. DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED.

selected by the respondents and otherwise complying with clause 3. The coal company did not on the true construction of the contract undertake the risk of the adaptability of the coal delivered to the purposes of the respondents. There was no warranty expressed or, according to the authorities, to be implied from this contract that the coal delivered should be suitable for any particular purpose or of any particular analysis. The contract was to deliver coal from mines and seams selected by the respondents of a character which complied with the provisions of clause 3. As regards its being reasonably free from stone and shale, the evidence shewed that the coal was made by efficient picking as free from stone and shale as it was possible to make it, as free as the product of the best-known collieries of the province. It was shewn to be good commercial coal fit for steam and other purposes, and there was no obligation on the appellants, either express or implied, that coal being of the contract specification should be of such an analysis in respect to sulphur and ash as to make it suitable for steel-making purposes. Reference was made to *George D. Emery Co.* v. *Wells* (1); *Gillespie Brothers* v. *Cheney, Eggar & Co.* (2); Sale of Goods Act, 1893, s. 14, which, it was contended, exactly reproduced the common law of England which prevails in Nova Scotia as to the buyer being entitled to rely on the skill and judgment of the seller; *Jacobs* v. *Scott* (3); *Frost* v. *Aylesbury Dairy Co.* (4) With regard to the claim that there should be implied from this contract that the coal was warranted to be suitable to the respondents' purposes, it is laid down in the following cases that you cannot imply a warranty from the statement of the purposes for which goods are supplied, unless that statement be made under such circumstances as to shew that the buyer relied in making the contract on the judgment and skill of the vendor to supply goods suitable thereto: see *Gillespie Brothers* v. *Cheney, Eggar & Co.* (2); *Bigge* v. *Parkinson* (5); *Brown* v. *Edgington* (6); *Jones* v. *Just* (7); *Drummond* v. *Van Ingen* (8); *Chanter*

(1) [1906] A. C. 515, 523.
(2) [1896] 2 Q. B. 59.
(3) (1899) 2 F., H. L. 70.
(4) [1905] 1 K. B. 608.
(5) (1862) 7 H. & N. 955.
(6) (1841) 2 Man. & G. 279, 309.
(7) (1868) L. R. 3 Q. B. 197, cited in *Jones* v. *Padgett*, (1890) 24 Q. B. D. 650, 654.
(8) (1887) 12 App. Cas. 284.

v. *Hopkins* (1); *Preist* v. *Last* (2); *Douglas* v. *Baynes*. (3) The lowness of the price of the coal as fixed by this contract is almost a conclusive guide to shew that no warranty was intended of the nature claimed by the respondents. It was contended that clause 3 and clause 1 of the contract should be read together as defining the kind of coal to which the respondents were entitled: see *Ogden* v. *Nelson* (4); *Inglis* v. *Buttery* (5); *Drummond* v. *Van Ingen* (6); *Jones* v. *Just* (7); *Randall* v. *Newson* (8); *Strongitharm* v. *North Lonsdale Iron and Steel Co.* (9)

Sir R. Finlay, K.C., Nesbitt, K.C., H. M'Innes, K.C., A. M. Stewart, and *Geoffrey Lawrence,* for the respondents, contended that the judgment appealed from was right. It was contended that under this contract the appellants were not entitled to deliver to the respondents coal not fit for use in their works, while the evidence shewed that coal fit for such use was being extracted by the appellants from their mines, and that the respondents were not bound to buy all their coal from them, whether it was fit for their use or not. The coal company knew when the contract was made that their coal was required for the manufacture of iron and steel and that it must shew a certain freedom from sulphur, because the iron produced must be practically free from sulphur. There must also be a certain freedom from ash. The value of coal to the respondents increases very rapidly as the sulphur falls off. Greater efficiency is obtained from the plant, and the iron product is of higher and more regular quality. So also the less ash, the less waste, the better the quality of the coke and of the coal. "Freshly mined" in clause 3 means not banked or stored, for coal banked after mining tends to lose some of its heating and gas-producing qualities. Run-of-mine, as opposed to screened or slack coal, is as regards size the coal as it comes from the mine, the screened being the larger lumps, the slack being mostly the coal dust. The rejected coal was shewn by the evidence to be unfit for use by the respondents in their works and could not be made fit for

(1) (1838) 4 M. & W. 399, 404–6.
(2) [1903] 2 K. B. 148.
(3) [1908] A. C. 477.
(4) [1903] 2 K. B. 287, 297.
(5) (1878) 3 App Cas. 552.
(6) 12 App. Cas. 284.
(7) L. R. 3 Q. B. 197, cited in *Jones* v. *Padgett*, 24 Q. B. D. 650, 654.
(8) (1877) 2 Q. B. D. 102.
(9) (1905) 21 Times L. R. 357.

J. C. 1908

DOMINION COAL COMPANY, LIMITED v. DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED.

use. It was not reasonably free from stone and shale within the meaning of the contract, and it was not from the seam designated by them. The respondents were entitled to reject all coal not fit for their use, for a contract to supply an article for a particular use is a contract to supply an article fit for that use. Clause 1 does not relate solely to quantity, but describes the thing to be supplied. Clause 3 does not restrict the meaning of clause 1 or exclude the obligation to provide coal fit for metallurgical purposes. On the contrary, it defines the meaning of "suitable," and distinguishes between coal which can be used in the respondents' iron and steel plant and coal which can only be used for other purposes. Clauses 4 and 9 are unintelligible, unless the appellants are bound to supply coal fit for the respondents' uses. The steel company would never have consented to take coal which they cannot use and can only resell to the vendors at a loss. Where the effect of giving a particular construction to a contract would be to put one party completely at the mercy of the other, that construction ought not to be resorted to, unless the words used admit of no other meaning. The true principle of construction is that where selection is left to the seller he must select that which is suitable for the purposes intended and within the contemplation of the parties. Reference was made to *Strongitharm* v. *North Lonsdale Iron and Steel Co.* (1); *Drummond* v. *Van Ingen* (2); *Mersey Steel and Iron Co.* v. *Naylor.* (3) It was contended that this principle of construction was not displaced either by the subject-matter of the contract not being a manufactured article, or by the defect complained of being latent, or by the designation of the seam from which the coal is to come, or by the fact that specific qualities are insisted upon other than that of general fitness for the uses contemplated. The governing condition was fitness for iron and steel producing purposes, and other definitions were intended to aid the ascertainment of that condition, not to exonerate from its performance.

It was further contended that, even if the respondents were

(1) 21 Times L. R. 357.
(2) 12 App. Cas. 284, 294, 296, 297.
(3) (1882) 9 Q. B. D. 648, 657; S. C. (1884) 9 App. Cas. 434, 443.

not entitled to reject the coal tendered to them, the appellants were not entitled to withdraw from the contract. Damages would have been a sufficient remedy, and the respondents shewed no intention, and had no intention, of refusing to carry out the contract on their side. As regards the respondents' remedy, in the events which have happened it was submitted that they were entitled to a decree for specific performance, and that damages, except for the short deliveries in August to November, 1906, were an inadequate remedy. The contract was of an exceptional character. The legal remedy of damages is inadequate for many reasons. The length of time over which the contemplated obligations extend, and the consequent impossibility of ascertaining the damages in anticipation of the probable conditions of the market in a distant future—that is, of ascertaining the present values of future obligations, even the proximity of the appellants' coalfields to the respondents' works—point to specific performance rather than damages as the proper remedy in this case: see *Fothergill* v. *Rowland* (1) and *Buxton* v. *Lister*. (2)

Danckwerts, K.C., replied, citing *Withers* v. *Reynolds* (3); *Mersey Steel and Iron Co.* v. *Naylor* (4); *Emery* v. *Wells* (5); *McCowan* v. *McKay* (6); *Jones* v. *Padgett* (7); *Aspdin* v. *Austin* (8); *James* v. *Cochrane*. (9) He contended that the remedy was not specific performance, but damages: see *Blackett* v. *Bates* (10); *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (11); Fry on Specific Performance, 4th ed., s. 69 et seq. The contract is not of such a nature as to warrant a decree for specific performance.

1909
Feb. 11.

The judgment of their Lordships was delivered by

LORD ATKINSON. In this case the Dominion Coal Company (hereinafter called the coal company), the defendant in the

(1) (1873) L. R. 17 Eq. 132, 140
(2) (1746) 3 Atk. 383.
(3) (1831) 2 B. & Ad. 882.
(4) (1884) 9 App. Cas. 434.
(5) [1906] A. C. 477.
(6) (1901) 13 Manitoba Rep. 590.
(7) 24 Q. B. D. 650.
(8) (1844) 5 Q. B. 671, 683.
(9) (1852) 7 Ex. 170.
(10) (1865) L. R. 1 Ch. 117.
(11) (1874) L. R. 9 Ch. 331.

J. C.
1909
DOMINION COAL COMPANY, LIMITED v. DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED.

action, appeals from a judgment of the Supreme Court of Nova Scotia, dated January 22, 1908, affirming the judgment of Longley J. in favour of the respondents (the plaintiffs in the action), by which specific performance of a certain agreement, dated October 20, 1903, entered into between the coal company and the Dominion Iron and Steel Company, Limited (hereinafter called the steel company), was decreed, and the plaintiffs were declared entitled to damages for certain breaches of this agreement, which damages were referred for assessment.

A cross-appeal against the same judgment has been filed by the plaintiffs, and the appeals have by order been consolidated. The cross-appeal, however, was not pressed.

The main question for their Lordships' decision turns upon the construction of three or four clauses in this agreement. Both the coal company and the steel company are incorporated by statutes of the Colony, and had, at the date of the agreement, common directors.

The coal company had leased from the Crown extensive coal-fields on each side of Sydney Harbour, in the province of Nova Scotia, but had only opened mines on the south-east side of the harbour. These mines, four in number, named the "Hub," "Harbour," "Phelan," and "Emery," were worked by the steel company under lease from the coal company from July 12, 1902, till October 20, 1903. Before the latter date pits Nos. 1 to 5 had been opened on the Phelan seam and worked; pit No. 6, which is some considerable distance (four miles) from the nearest of the other pits on this seam, was only opened in June or July, 1906.

The steel company owned and operated extensive works for the manufacture of steel at Sydney. On July 1, 1899, they entered into an agreement with the other respondent, the National Trust Company, Limited (hereinafter called the trust company), for securing a bond issue of $8,000,000, by which the steel company assigned to the trust company all its present and future assets, the steel company to remain in possession till default. The trust company duly gave its consent to the execution by the steel company of the agreement sued on. It is unnecessary to refer to the several transactions which took

place between the coal company and the steel company prior to October, 1903, further than to point out that, as a consequence of them, each company must have been well acquainted with the business of the other, its needs and capacities, the mode in which it was carried on, and the character of the coal won in the pits theretofore worked.

The agreement of October 20, 1903, recited that the steel company had erected steel works at Sydney and was operating the same, and that the parties had agreed that the lease of the mines to the steel company should be cancelled, that the coal company should re-enter the premises leased, and that the coal thenceforth to be supplied to the steel company should be supplied on the terms and conditions thereinafter contained, and it then set forth in fourteen paragraphs in great detail what the terms and conditions were. The most important of these provisions are the following:—

"(1.) That the said coal company from its mines in Cape Breton County other than those lying north or west of Sydney Harbour will supply on the terms and conditions hereinafter stated to the steel company all the coal that the steel company may require for use in its own works as hereinafter described. The word 'works' shall mean:—

"Firstly, the following works now or hereafter constituting the steel company's steel and iron plant at Sydney or used in connection therewith with any additions thereto and substitutions therefor of a like character which the steel company may deem requisite at Sydney or east or south of Sydney Harbour within ten miles of Sydney Town:

"(A) The blast furnaces.

"(B) The coking ovens used for making coke for the said furnaces.

"(C) The steel furnaces.

"(D) The rolling mills for manufacturing rails, railway fish or angle plates, other plates for joining rails, structural steel, iron and steel bars, plates and rolled rods for wire manufacturers and providing rolling mill products analogous to any of those above named, excepting always rails, fish plates and plates for joining rails be hereafter used in commerce in lieu of the products

J. C. 1909

DOMINION COAL COMPANY, LIMITED v. DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED.

above named to such an extent as to reduce the demand for the same, then for manufacturing such analogous products of not more finished character and also for manufacturing such fundamental raw material as billets, slabs or blooms.

"(E) Or in event of the articles or materials mentioned in paragraph (D) being hereafter produced by mills other than rolling mills, then such other mills.

"Provided always that all the products of the said steel furnaces and mills shall be made from iron produced by such blast furnaces with the addition only of the spiegel iron, ferro manganese, raw ore, scrap steel, scrap iron and materials other than iron and steel necessary to be added to the pig iron product of such blast furnaces in order to make steel, and shall be either for the use of the steel company in the construction and repair of its plant or for purposes of sale.

"(F) Incidentally to the foregoing, the necessary gas producers, kilns, ovens, foundries, electrical machinery, hoisting engines and repair shops, but for use only in furnishing material for the construction, repair and operation of such furnaces, coking ovens and mills, and for lighting and heating the said works.

"Secondly. The mines and quarries which the company may operate at Sydney or elsewhere in Canada and in Newfoundland for the purpose of supplying material other than coal and products of coal to the said blast furnaces and steel and iron plant as above described.

"Thirdly—

"(A) The steam vessels owned or hired by the steel company, on not less than three months' time charter and operated for its own requirements, and

"(B) The switching engines at Sydney and at its mines and quarries which the steel company may require incidental to the operation of its said business as above described.

"Provided always that the coal company, notwithstanding anything in this contract contained, shall not be obliged to supply in any one month a quantity of coal exceeding the quantity required to furnish the coal or coke necessary to operate blast furnaces of a capacity not exceeding that of the steel company's present four blast furnaces, and to operate the steel

furnaces and mills with incidental plant as above described engaged in manufacturing the product of such four blast furnaces or their equivalent with the mines, quarries, vessels and engines operated incidentally thereto.

. . . . .

"(3.) All coal furnished shall be freshly mined and of the grade known as 'run-of-mine,' reasonably free from stone and shale, and shall be supplied from such seams then being worked by the coal company as the steel company may designate. The coal company may, after the expiry of four years from the date of this agreement, supply slack coal of the same specification as to quality as above if suitable for use in steel-making and for blast furnace coke, and may also supply slack coal for other purposes for which it can be used without disadvantage by the steel company. In construing the above clause the use of slack coal shall not be deemed to be a disadvantage merely because the use thereof necessitates changes in the grate bars of the steel company. 'Suitable' shall be construed to mean that the slack coal so supplied when properly washed by the steel company shall not contain a percentum of impurities, to wit: ash and sulphur, appreciably greater than the percentum of impurities in the same coal of run-of-mine grade when crushed and washed in the same manner.

"All coal supplied hereunder that requires to be washed shall be washed by the steel company, and should the steel company establish and operate a coal washing plant between the point of origin of such coal and the steel company's blast furnaces, the coal company shall, at the actual cost thereof, allow such coal to be washed in transit.

"(4.) The steel company further agrees with the coal company that, so long as the coal company shall be willing and ready to supply coal for the use of the steel company, all coal required by the latter shall be purchased from the coal company to the amount agreed to be supplied by the coal company under the terms of this contract."

The steel company, in exercise of the privilege conferred upon it, designated the Phelan seam as that from which they desired to be supplied.

J. C.
1909
DOMINION COAL COMPANY, LIMITED v. DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED.

It was established in evidence beyond dispute (1.) that over 90 per cent. of the coal required by the steel company was to be used for the different processes in the manufacture of steel (described in the evidence as "metallurgical"), and less than 10 per cent. for the generation of power; (2.) that coal which in its raw state contained more than 2·75 per cent. of sulphur, and after having been broken and washed more than 1·7 per cent., was unfit for the former purposes, and could not be used without danger of injury to the manufactured products.

In March, 1905, the steel company gave the coal company notice that from April 1, 1906, they would require to be supplied with 80,000 tons of coal per month. No objection was taken to this demand, and it is not disputed that during the eight months succeeding that date the coal company obtained from the Phelan seam coal suitable for all the steel company's purposes vastly in excess of this amount. It was proved at the trial, and found by the judge, that the coal company had on many occasions failed to deliver the amount of coal required, and that the steel company had in consequence been obliged to purchase coal at a higher price elsewhere to keep their works going. The trial judge referred it to a referee to ascertain the damages sustained by reason of these short deliveries and decreed that the coal company should pay the same when ascertained.

Between November 1 and 9, 1906, the steel company rejected as unfit for use in their works 153 carloads of coal, i.e., about 2698 tons. Thereupon a lengthy correspondence took place between the officials of the respective companies as to the rejection and return of this coal. At length, on November 8, 1906, the manager of the steel company wrote to the coal company the following letter:—

"We are in receipt of your favor of November 7th, and note that you state that cars which we refused to accept contained coal as labelled, namely: Phelan seam of run-of-mine grade, which has been carefully picked and in accordance with the contract. We beg to state that the coal contains an undue percentage of shale and slate and sulphur and is unsuitable for our requirements, and is not in accordance with the contract. This certainly is a reason why we should not accept this coal.

"Referring to our letter of October 18th, in which we notified you that after October 31st we would not accept from you any coal excepting freshly mined run-of-mine coal from the Phelan seam, we beg to say that we certainly think you were aware of the quality of the coal we required for our uses on the plant, and now notify you that all coal you deliver to us must be freshly mined run-of-mine coal from the Phelan seam and suitable for our purposes."

To this letter the coal company, on November 9, replied as follows :—

"In consequence of your peremptory refusal to accept the coal which we have furnished and have been ready and willing to furnish in accordance with terms of our contract with you, dated 20th October, 1903, there is no course left open to us but to accept the necessary consequence of your action in this matter. Your conduct in refusing to accept delivery of coal furnished and to be furnished constitutes a clear repudiation on your part of your obligations under the contract, and renders further performance on our part impossible. We therefore formally notify you that the contract mentioned is at an end.

"I greatly regret your repudiation of a contract the nature of which has involved the expenditure of millions of money on our part, and we cannot understand your disregard, not only of our contract rights, but of the large interests necessarily affected by your action.

"You have also violated the contract by not returning our cars, and by purchasing coal from other parties in violation of the provisions of the contract.

"Our cars in the assembly yard loaded with coal furnished under the contract and rejected by you we will proceed at once to remove."

The trial judge found as questions of fact (1.) that the coal rejected was unfit for use by the steel company for its metallurgical purposes owing to the large quantity of sulphur it contained, and (2.) that it was not "reasonably free from stone and shale." The Supreme Court accepted those findings, and, in their Lordships' opinion, they were abundantly justified by the evidence.

A considerable body of evidence was given to establish that the

J. C. 1909 — DOMINION COAL COMPANY, LIMITED v. DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED.

only coal won from the Phelan seam which was unfit for all the steel company's purposes was that which came from the workings in pit No. 6 and those on the east side of pit No. 4.

During the year 1905 the parties endeavoured to compose their disputes and to establish a modus vivendi between them, but, by letter dated October 18, 1906, the manager of the steel company formally terminated the arrangement which had been arrived at, and the parties were thenceforth remitted to their legal rights.

The steel company and the trust company accordingly instituted this action on December 8, 1906, and in their statement of claim, in addition to claiming damages under the several heads therein set forth in respect of the breaches of contract alleged to have been committed by the coal company, prayed (amongst other things) that it might be declared that, as against each of the plaintiffs, the coal company had no power to rescind the contract of October 20, 1903, and that they might be ordered to carry out the same, and that they might be restrained by injunction from carrying on any business until the said contract had been carried out, and that a receiver might be appointed over their business in case they refused to carry out the same, or, in the alternative, in case the Court should be of opinion that the plaintiffs' remedy was for damages for loss of their contract, the plaintiffs claimed in respect thereof $15,000,000 in addition to the damages under other heads.

Owing to the nature of the relief claimed and granted, the main question to be determined is whether the rejection and return by the steel company of these 153 carloads of coal, coupled with the demands they made in respect of the future supply, justified the coal company's repudiation of their contract. And this again depends on the question what, on the true construction of the contract, is the meaning of certain words or phrases contained in it, namely, (1.) the words "all the coal that the steel company may require for use in its own works as hereinafter described," occurring in the first few lines of paragraph No. 1, and (2.) the words "reasonably free from stone and shale," occurring in paragraph No. 3 ?

It is not, in their Lordships' view, a case in which it is necessary to import by implication words into a contract in order

to effectuate the common intention of the parties to it. What is necessary is to determine what they meant by the language they employed. The numerous authorities cited in argument dealing with the principles upon which terms are to be so introduced into a contract need not, therefore, be discussed.

It was strenuously contended on behalf of the coal company, both before their Lordships and in the Colonial Courts, that in the coal trade the phrase "reasonably free from stone and shale" has a trade meaning; that it, in effect, implies that the coal is to be as free from stone and shale as it can be made by reasonable and proper picking, and nothing more; and that, no matter how overcharged with stone or shale the coal may be, if these impurities happen to be carried in laminæ permeating the lumps of coal so that they cannot be removed by picking, the coal must be taken to be reasonably free from stone and shale within the meaning of the words. In the opinion of their Lordships this contention cannot be sustained. The words of the contract, they think, mean that the coal must in fact be "reasonably free from stone and shale," irrespective of the method by which that fact may be ascertained.

The proper meaning to be given to the words contained in paragraph No. 1 is a matter much more difficult to determine.

It is clear upon the evidence that coal may satisfy all the requirements of paragraph 3, and yet be so overcharged with sulphur as to be quite unfit to be used for metallurgical purposes. And the contention of the coal company is that though over 90 per cent. of the coal supplied to the steel company was, as they well knew, required for those purposes, yet they are under no obligation to deliver coal reasonably suitable for them, provided only it satisfies the requirement of paragraph 3. Both parties, the coal company alleges, knew the nature of the coal taken from the seam. Up to the date of the agreement it was, with the exception of what came from the east side of pit No. 4, all suitable for the smelting operations carried on by the steel company. Guided by this knowledge, the steel company (they urge) concluded that the provisions of paragraph 3 afforded them adequate protection, and that they were therefore willing to take their chance as to the purity and fitness of the coal to be won

J. C.
1909
DOMINION COAL COMPANY, LIMITED
v.
DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED.

from the seam or seams they might designate. The function of paragraph 1, the coal company alleges, was merely to furnish a measure of supply.

No doubt there is much to be urged in favour of this view; but, on closer examination of the several provisions of the contract, it appears to their Lordships not to be the true view of the mutual rights and obligations of the parties.

In the first place, the detailed enumeration and description of the steel company's works contained in paragraph 1 cannot have been introduced as a measure of quantity. This is clear from the proviso at the end of the paragraph, which itself sets up a definite measure of quantity of a different character, namely, "the quantity required to furnish the coal or coke necessary to operate blast furnaces of a capacity not exceeding that of the steel company's present four blast furnaces, and to operate the steel furnaces and mills with incidental plant as above described engaged in manufacturing the product of such four blast furnaces or their equivalent." Evidence was given that the restriction of the amount to the requirements of the four blast furnaces existing at the date of the agreement, or of furnaces equivalent to them, was one of the advantages the coal company gained by the new arrangement of which the agreement of October 20, 1903, was part.

Again, in the enumeration in paragraph 1, there is no limitation as to the number of blast furnaces, coking ovens, steel furnaces, rolling mills, &c., which the steel company might use or employ. In the absence of a such a limitation the enumeration could not afford any measure of quantity; yet it must be taken to have been introduced for some purpose, and the only purpose it can apparently subserve is to specify precisely and in detail the various uses to which the coal to be supplied was to be put. There would be no object, however, in doing this if the coal company was not at all concerned with the suitability of their coal for these uses.

Again, only one of the requirements of paragraph 3 deals with the chemical composition of the coal. It is to be "reasonably free from stone and shale." Nothing is mentioned expressly in any other part of the contract as to the ash to be left when it

is burned, or the amount of sulphur it may contain, and there obviously cannot be any such thing as run-of-mine slack. The slack to be supplied, however, must be "suitable for use in steel-making and for blast furnace coke"; that is, it must not, when washed in the same manner as the run-of-mine coal, contain appreciably more ash or sulphur than the coal. The standard set up is, no doubt, a standard for slack, but it is strange that the freedom of the slack from sulphur should be measured by the purity in the same respect of the coal, if the amount of sulphur, at least in an organic form, contained in the coal was a matter with which the coal company had no concern. On the other hand, if the coal was to be so free from ash and sulphur as to be "suitable for use in steel-making and for blast furnace coke," it would be a most natural thing to provide that the slack should be equally pure, and therefore equally suitable in these respects. The provision at the end of paragraph 3 in reference to washing the coal was apparently introduced to relieve the coal company from an obligation which the other parts of the contract threw upon them or might throw upon them; but coal is washed to make it suitable for use for metallurgical purposes, and there is nothing in this contract to impose on the coal company a duty to wash the coal, unless it be found in an obligation to provide coal suitable for these purposes. And if that duty had not been thus impliedly imposed upon them, it is difficult to see why special clauses should have been introduced to relieve them from it. The whole clause seems, therefore, to suggest that the suitability of the run-of-mine coal for the uses indicated was within the contemplation of the parties when they entered into the contract.

Paragraphs 4 and 9 of the contract are most important. They impose on the steel company, for the full period of ninety years, an obligation to purchase all the coal they may require from the coal company, if the latter are ready to supply it, and provide, further, that the steel company shall not sell any of the coal supplied to them without the consent in writing of the coal company unless the latter refuse to repurchase it at $1 per ton, i.e., 20 cents per ton less than the cost price. These provisions would mean complete and speedy ruin to the steel company if

J. C. 1909 — DOMINION COAL COMPANY, LIMITED v. DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED.

90 per cent. of the coal supplied, or even a much less proportion of it, were unsuitable for the operations it was contemplated and intended they should carry on. And it is quite inconceivable that any rational business men would enter into an arrangement necessitating such results. These provisions of the contract are only explicable on the assumption that, of the coal to be supplied, 90 per cent. was to be reasonably suitable for use in the operations it was known the steel company intended to carry on in the works so fully described. In their Lordships' opinion, the words "all the coal that the steel company may require for use in its own works" must therefore be read and interpreted as if they ran "all the coal suitable in character that the company may require for use in its own works." It by no means follows, however, from this construction that the coal company warrant that all the coal to be supplied shall be of this character, or that they are absolutely bound, during the long period of ninety years, to supply from the designated seams coal of this kind to the amount required. Nor was either of these propositions contended for. The obligation of the coal company is, in their Lordships' opinion, much more limited. It is, as regards this matter of quality, independent of the provisions of paragraph 3 and of the obligations they specifically impose. They are bound to supply from the designated seam or seams coal reasonably suitable in quality for the purposes of the steel company indicated in the contract, to the extent that the same can be obtained by the reasonable and proper working of the mines opened or to be opened therein. The burden this places on the coal company is easy to bear and is fully compensated for by the price to be paid for their coal, moderate though that price be. They will, no doubt, be prevented from doing what they have, in effect, done, and claimed the right to do, namely, the right to discriminate against the steel company, to select deliberately from their vast supplies of coal the particular description which they knew to be almost entirely unsuitable for the uses for which it was required, and to dispose of what was suitable for those uses to others; but beyond that it would not hamper them in their business. According to this view, the coal company were not justified in repudiating their contract, but the steel company

are not entitled, at one and the same time, to specific performance of the contract and to damages for the loss of it. Inasmuch, however, as, according to their Lordships' view, this is not a contract of which, on the authorities cited, specific performance would be decreed by a Court of Equity, the plaintiffs are entitled, owing to the wrongful repudiation of the contract by the defendants, to treat the contract itself as at an end and to to recover damages for the loss of it, in addition to damages in respect of those breaches of it which may have been committed before repudiation. The proper reference should, their Lordships think, be directed to ascertain these damages.

Their Lordships will therefore humbly advise His Majesty that the judgment of the Supreme Court should be affirmed, and that the case should be remitted to that Court to have the damages under the two heads above mentioned assessed in the usual way.

The appellants must pay the costs of the principal appeal. There will be no order as to the costs of the cross-appeal.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Hill, Son & Rickards.*

[PRIVY COUNCIL.]

J. C.* 1909

Feb. 3; *March* 2.

CHANG HANG KIU AND OTHERS . . . . APPELLANTS;

AND

SIR FRANCIS T. PIGGOTT AND ANOTHER . RESPONDENTS.

In re LAI HING FIRM . . . . . BANKRUPTS.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Hong Kong Supreme Court Ordinance, 1873, *s.* 31—*Construction—Right of Appellants to shew Cause before Sentence.*

The appellants, having been summarily committed to prison by the Chief Justice under Hong Kong Supreme Court Ordinance 3 of 1873, s. 31, for wilful and corrupt perjury before the Bankruptcy Court, moved unsuccessfully for a discharge of the order on the grounds that they had not been informed by the Chief Justice what statements made by them constituted the perjury and that they had had no opportunity of shewing cause before sentence:—

Held, (1.) that the Ordinance did not contemplate the accusation being formulated in a series of specific allegations of perjury and that its gist had been made sufficiently clear; (2.) that as the Ordinance did not dispense with giving the appellants an opportunity before sentence of explaining or correcting misapprehensions of their statements, it was essential that it should be accorded to them.

In re Pollard, (1868) 5 Moo. P. C. (N.S.) 111; L. R. 2 P. C. 106, followed.

APPEAL by special leave from a judgment of the Full Supreme Court (May 16, 1906) affirming a judgment of the Chief Justice (April 24, 1906) which affirmed an order made by him whereby the appellants were summarily committed to prison under the circumstances stated in the judgment of their Lordships.

On November 24, 1905, the Supreme Court sitting in bankruptcy ordered that an issue be tried to determine whether one Wong Ka Chuen was at the date of the petition therein a partner in the Lai Hing Bank, the indebted firm. The official receiver was plaintiff and Wong Ka Chuen defendant. The plaintiff called as witnesses the appellants and one Wong Tse, eight in all. The jury found for the defendant, but before giving judgment the Chief Justice ordered the eight witnesses to be called before

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

him, and thereupon, the seven appellants being present, but Wong Tse being absent, said: "The eight witnesses have to my mind been guilty of the most flagrant conspiracy to defraud the alleged partner, Wong Ka Chuen. They have each one been guilty of the most corrupt perjury, and in virtue of the provisions of the law which empowers me to deal at once with such cases I commit each of them to prison for three months without hard labour." The appellants were accordingly thereupon imprisoned under warrants of commitment purporting to be made pursuant to s. 31 of Ordinance No. 3 of 1873. The judgments of the Courts below refused a direct motion by the appellants that the order of commitment be dissolved and quashed a writ of habeas corpus which had been issued.

E. H. Sharp, K.C., and *A. Romer Macklin*, for the appellants, contended that the order of commitment ought to be reversed. They had not been informed before sentence and did not know what were the statements which constituted the alleged perjury. They had no opportunity of being heard in their own behalf or of shewing cause against the sentence. By common law and by s. 31 of the Ordinance, which authorized a commitment "as for a contempt of Court," they were entitled to the said information and opportunity. There was no jurisdiction to sentence them for conspiracy, but only for perjury; and if they had had the opportunity they might have satisfied the Chief Justice of their innocence, or at least have raised so much doubt in his mind as to induce him to direct a prosecution instead of proceeding summarily. They cited *Rex* v. *Gaskin* (1); *Pollard's Case* (2); *Capel* v. *Child* (3); *Cooper* v. *Wandsworth Board of Works* (4); *Reg.* v. *Smith.* (5)

The respondents, the Chief Justice and his colleague, did not appear.

1909
March 2.

The judgment of their Lordships was delivered by

LORD COLLINS. This is an appeal from the Supreme Court of Hong Kong, confirming an order made by the Chief Justice

(1) (1799) 8 T. R. 209.
(2) L. R. 2 P. C. 106.
(3) (1832) 2 C. & J. 558.
(4) (1863) 14 C. B. (N.S.) 180, 194.
(5) (1844) 5 Q. B. 614.

J. C.
1909
CHANG HANG KIU v. PIGGOTT. LAI HING FIRM, *In re.*

sitting in bankruptcy committing the appellants to prison for three months as for a contempt of Court in respect of wilful and corrupt perjury found by the Court to have been committed by them as witnesses in open Court on the trial of an issue in bankruptcy before the Chief Justice on April 4, 5, 6, 7, 9, and 10, 1906.

The committal purported to be made pursuant to s. 31 of Ordinance No. 3 of 1873, which is in the following terms:—"If in any cause, action, or suit, civil or criminal, or in any proceeding connected therewith, it appears to the Court that any person examined as a witness . . . . has committed wilful and corrupt perjury, or that any person . . . . in any affidavit . . . . required to be made before the Court has been guilty of the like offence, then, in each and every such case, it shall and may be lawful for the Court to direct a prosecution for perjury to be forthwith instituted against such person . . . . in order that he may be punished according to law; or where such perjury is committed by any person examined as a witness in open Court, it shall be lawful for the Court, instead of directing such prosecution to be instituted as aforesaid, either to commit such witness as for a contempt of the Court to prison for any term not exceeding three months, with or without hard labour, or to fine such witness in any sum not exceeding one hundred dollars."

On April 20, 1906, a motion was made before the Chief Justice for the discharge of the committal order, on the ground that the appellants were not informed by the Chief Justice what statements made by them respectively constituted the alleged perjury, and on the ground that, before sentence was passed upon them, an opportunity was not given to them of being heard in their own behalf or of shewing cause why they should not be so committed.

The Chief Justice confirmed the order, and on appeal to the Full Court, consisting of himself and Wise J., the decision of the Chief Justice was affirmed.

The issue on the hearing of which the perjury was found by the Chief Justice to have been committed was "whether one Wong Ka Chuen was at the date of the presentation of the petition herein a partner in the . . . . debtor firm."

The appellants gave evidence in support of the contention that he was.

The jury found that he was not.

After the verdict was given, it appears from the shorthand note that the Chief Justice desired the eight witnesses who had given evidence in support of the affirmation, i.e., the appellants and one other who had left the Court, to be called forward. He then addressed them as follows, the interpreter explaining what he said: "The eight witnesses have to my mind been guilty of the most flagrant conspiracy to defraud the alleged partner, Wong Ka Chuen. They have each one been guilty of the most corrupt perjury, and in virtue of the provisions of the law which empowers me to deal at once with such cases I commit each of them to prison for three months without hard labour."

With regard to the first ground of objection taken by the appellants, namely, that they were not informed by the Chief Justice what statements made by them respectively constituted the alleged perjury, their Lordships are of opinion that it is not established in point of fact. The statement made by the Chief Justice was to the effect that the whole evidence given by the appellants convinced him of a conspiracy on their part to make it appear that Wong Ka Chuen was at the date of the presentation of the petition a partner in the Lai Hing firm, and that all they had said material to that issue was a tissue of deliberate falsehoods. Their Lordships think that, having regard to the nature of the charge he was making against the appellants, it did not admit of being formulated in a series of specific allegations of perjury, and that the gist of the accusation he was making ought to have been sufficiently clear to them from the language which he employed to express it. They agree with the Chief Justice that the alternative course left open to the judge by the Ordinance of committing a witness as for contempt of the Court contemplates summary proceedings on the spot not involving a statement or trial of specially formulated issues. But though, in their Lordships' opinion, the language used by the Chief Justice was quite sufficiently specific to make the appellants aware of the pith of the charge against them, they think that the Chief Justice should, before sentencing them, have

J. C. 1909 CHANG HANG KIU v. PIGGOTT. LAI HING FIRM. *In re.*

given them an opportunity of giving reasons against summary measures being taken. This need not have involved, as suggested in argument, the case being thereupon retried and witnesses called, which would have deprived the alternative course of the summary character which (it is reasonable to suppose) was deemed important by the framers of the Ordinance who enacted it as an alternative to formal proceedings for perjury; but it would have given an opportunity for explanation and possibly the correction of misapprehension as to what had been in fact said or meant. The report of this Board in *In re Pollard* (1) treats the giving of such opportunity as essential in cases of committal for contempt of Court. The Chief Justice treated *Pollard's Case* (1) as a binding authority, but as not applying to a case of committal for perjury, notwithstanding the words of the Ordinance "as for a contempt of Court." But the reason given in the Privy Council for the rule is that contempt of Court is a criminal offence. A fortiori, therefore, it would be essential before a summary conviction for perjury, unless the statute dispensed with it, which cannot be alleged in this case. Their Lordships will therefore humbly advise His Majesty that the appeal be allowed, the judgments of the Supreme Court of April 24 and May 16, 1906, reversed, and the committal order rescinded.

There will be no order as to the costs of the appeal.

Solicitors for appellants: *Langlois & Co.*

(1) 5 Moo. P. C. (N.S.) 111.

[PRIVY COUNCIL.]

JACOB BRUHN . . . . . APPELLANT;

AND

THE KING ON THE PROSECUTION OF THE OPIUM FARMER . . . . . RESPONDENT.

J. C.*
1909
Feb. 3, 4, 26.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Straits Settlements Opium Ordinance, 1906, *s.* 73—*Construction—Conviction of Master for importation of Chandu—Onus probandi.*

Held, on a consideration of the provisions of the Straits Settlements Opium Ordinance, 1906, that s. 73, which renders the importation of chandu a penal offence by the master and owner of the importing ship, applies to cases where chandu is in fact imported, but the prosecution have not the means of proving by whose aid, assistance, or procurement, or with whose privity or consent, or in whose interest or for whose profit that was done.

Accordingly a conviction and fine thereunder of the appellant, master of the steamship *Devawongsee*, of importing chandu, where it was conceded that the owner, the appellant, and his chief officer were ignorant thereof, and the magistrate was satisfied that every precaution had been taken, were sustained in the absence of evidence that no other officers or servants or crew or other persons employed on the ship had not been implicated in the use of the ship for that purpose.

APPEAL by special leave from a judgment of the Supreme Court (December 19, 1907) affirming the conviction of the appellant by a police magistrate of the Settlement of Singapore (July 19, 1907) for an offence under s. 73 of the Straits Settlements Opium Ordinance, 1906 (No. XX.).

The material sections of the Ordinance and the circumstances under which the appellant, who was master of a ship owned by the North German Lloyd Company, was convicted are detailed in the judgment of their Lordships. It was throughout the proceedings in the Courts below conceded that both master and owners were ignorant of the existence on board of the chandu which was discovered.

The magistrate considered that he had no option, but was

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

J. C. 1909 BRUHN v. REX.

bound to convict the appellant unless he was able to prove affirmatively both that every reasonable precaution had been taken to prevent the illegal user of the ship and also that none of the crew or persons employed on board were implicated therein. He considered that the appellant had succeeded on the first requirement but had failed on the second.

The Supreme Court upheld the conviction.

Danckwerts, *K.C.*, and *Latter*, for the appellant, contended that on its true construction s. 73 did not enact and did not mean that the presence of opium or chandu on board a ship in excess of the named amount is conclusive evidence of the wrongful user of the ship. The whole of the evidence should have been considered, and a conviction should not have been made and was not obligatory upon the Court merely because the appellant had failed to prove both the exceptions made in paragraph (*c*) of s. 73. The wrongful user of the ship required by that section is by some person having control thereof, and no such user was proved. There was no hard and fast obligation to convict merely because chandu was found, when the appellant was cleared of all knowledge or guilty intention in respect thereof. Reference was made to *Powell* v. *Kempton Park Racecourse Co.* (1); *Gaudet* v. *Brown* (2); *Northard* v. *Pepper* (3); *Garbutt* v. *Durham Joint Committee* (4); *Hewitt* v. *Taylor* (5); *Barraclough* v. *Greenhough* (6); *Reg.* v. *Sleep* (7); *Reg.* v. *Cohen.* (8)

Avory, *K.C.*, and *Christopher James*, for the respondent, contended that on the true construction of the Ordinance, and especially of s. 73, the conviction was right. There was no evidence, or at least no sufficient evidence, to shew that none of the officers, their servants or the crew, or any persons employed on board the ship were implicated in the user of the ship for importation of chandu contrary to the Ordinance. That burden of proof was cast upon the accused.

(1) [1899] A. C. 143, 160, 172.
(2) (1873) L. R. 5 P. C. 134.
(3) (1864) 17 C. B. (N.S.) 39, 50.
(4) [1906] A. C. 291.
(5) [1896] 1 Q. B. 287.
(6) (1867) L. R. 2 Q. B. 612.
(7) (1861) Leigh & Cave, Crown Cases, 44, 49, 53.
(8) (1858) 8 Cox, C. C. 41.

J. C.
1909
BRUHN
v.
REX.

The mere fact that the chandu was found on board was evidence of wrongful user of the ship, and the accused could not exonerate himself from liability according to the true intent and meaning of s. 73 unless he satisfied the magistrate in regard to both of the requirements made by him. Reference was made to ss. 68, 69, and 72 of the Ordinance; also to cases under the Customs Act, 1876; *Lord Advocate* v. *Crookshanks* (1); and, under New Zealand Patents, Designs and Trade Marks Act, 1889, *Commissioner of Trade and Customs* v. *Bell* (2); also to *Sherras* v. *De Rutzen*. (3)

Danckwerts, K.C., replied.

1909
Feb. 26.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Supreme Court of the Straits Settlements, dated December 19, 1907, dismissing an appeal by the present appellant against his conviction on July 19, 1907, by Walter Cecil Mitchell, Esquire, a police magistrate of the Settlement of Singapore, for an offence under s. 73 of the Opium Ordinance, 1906, of the Straits Settlements. The section runs as follows:

"If any ship is used for the importation, landing, removal, carriage or conveyance of any opium or chandu contrary to the provisions of this Ordinance or of the rules made thereunder, or for the receipt or storage of any opium or chandu imported or moved contrary to the provisions of this Ordinance or the rules made thereunder, the master and owner thereof shall be liable to a fine not exceeding $5000 and the ship may be detained by order of the police court until security has been given for a sum not exceeding $5000.

"An amount of any such opium or chandu found on board any ship and exceeding:—

"(*a*) In the case of any steamship whose registered tonnage is 500 tons and upwards, 100 tahils in weight.

"(*b*) In the case of any steamship whose registered tonnage is under 500 tons and over 50 tons burden, 50 tahils in weight.

"(*c*) In the case of any other ship ten tahils in weight, shall

(1) (1888) 15 R. 995. (2) [1902] A. C. 563.
(3) [1895] 1 Q. B. 918.

J. C. 1909 BRUHN v. REX.

be deemed evidence that the ship has been used for the importation, landing, removal, carriage or conveyance of opium or chandu contrary to the provisions of this Ordinance, or for the receipt or storage of opium or chandu imported or moved contrary to the provisions of this Ordinance or the rules made thereunder, unless it is proved to the satisfaction of the Court that every reasonable precaution has been taken to prevent such user of such ship, and that none of the officers, their servants, or the crew, or any persons employed on board the ship, were implicated therein."

The facts of the case, which are few and simple, are not disputed, and the question for decision turns upon the true construction of the above-mentioned section.

The appellant is the master of the steamship *Devawongsee*, a vessel belonging to the North German Lloyd Company. Her registered tonnage is about 1057 tons. Having sailed from Swatow on July 9, 1907, on a voyage to Singapore, she arrived at the latter port on the 16th of that month, and anchored in the roadstead on the following day.

She was searched twice by the officers of the opium farmer, on the 17th cursorily, and on the 18th thoroughly. On the second occasion Sergeant Mussell, one of the police searchers, found 325 tahils of chandu (i.e., opium prepared for smoking, chewing, or swallowing) carefully concealed in one of the lifeboats, underneath the seat plank of the boat. It was necessary to unscrew this plank to discover the chandu. The quantity found was largely in excess of the maximum quantity mentioned in s. 73, and, as each tahil weighs about $1\frac{1}{3}$ oz. avoirdupois, amounted to about 27 lbs. in weight.

On July 19, 1907, the appellant was charged in the police court at Singapore, before the police magistrate above mentioned, that he "being the master of the steamship *Devawongsee*, and as such importing 325 tahils of chandu, valued at about $1000, contrary to s. 73 of Ordinance XX. of 1906," and was convicted and sentenced to pay a fine of $2000 and costs.

The appellant and his chief officer, Fred Vade, were the only witnesses examined for the defence. They both proved that the strict rule of the company is that their ships should be searched

after leaving one of these Eastern ports; that they had searched this ship and the lifeboat in which the chandu was subsequently discovered after leaving Swatow, though without taking up the seat plank, but found nothing; and that the crew knew it was forbidden to take opium on board. It was conceded that neither the owners nor these witnesses were themselves aware of the chandu's having been hidden in the lifeboat, though a statement to that effect is not contained in the printed notes of their evidence, but beyond their testimony no proof whatever was given that none of the officers, their servants, or the crew of the ship, or the persons (if any) employed on board of her, other than the two witnesses, were not aware of, or privy to, the concealment of the chandu in the lifeboat, or were not implicated in the alleged use of the ship for the purpose of importing that substance into Singapore. For all that appears upon the evidence, the chandu may have been hidden in the lifeboat for that very purpose, with the knowledge, by the aid, through the connivance, or with the consent of all, or any, of the last-mentioned persons, other than these witnesses.

On this evidence the magistrate states that he was satisfied that every precaution had been taken to prevent the ship being used for the importation of chandu, but that he was not satisfied, as indeed he could not well have been, that the second requirement of the section had been met. He accordingly convicted the appellant of the offence charged, believing, as he states, that he had no option but to do so, and imposed upon him the above-mentioned fine of $2000.

The question for decision is whether that conviction is valid in law. Their Lordships think it is.

The first matter to be determined is what are the necessary elements of the offence created by s. 73.

Mr. Danckwerts, on behalf of the appellant, contended that a vessel cannot be held to be "used," within the meaning of the section, for any of the purposes mentioned therein, unless a person having control over the ship authorizes her to be devoted to that use, and, further, that the owner or master cannot be convicted of an offence under it, unless it be shewn that he knew that the ship was being so "used"; in other words, that the

J. C. 1909 BRUHN v. REX.

enterprises prohibited by the section only become criminal as against the master or owner (as the case may be) if engaged in *knowingly* by the party accused, and also with the authority of a person entitled to control the employment or management of the ship.

The answer to this contention is (1.) that, if it were sound, the whole section would be useless, and might be rejected as surplusage, because the action of the accused, in such a state of circumstances, would, under the earlier provisions of the Ordinance, amount to another and much more serious offence subjecting him to much heavier penalties; and (2.) because it would render the provision at the end of sub-s. (*c*) nonsensical; since, if the master in command of a ship knowingly permits her to be used for a certain purpose, he is undoubtedly "implicated" in that project. But that is, under the sub-section, the precise fact which must be negatived if the prima facie proof is to be met. He must shew that none of the officers, including, of course, himself, were implicated in it in any way. In other words, the accused, in order to escape, must prove that he was ignorant of the very matter of which ex hypothesi he must be shewn to have had knowledge.

An examination of some of the earlier provisions of this Ordinance, designed, as it evidently is, at once to check the use of opium, and to forward the interest of the revenue by securing to the opium farmer the profits of the monopoly granted to him, thereby, presumably, increasing the rent or sum he pays for it, will shew clearly the meaning and object of s. 73.

By s. 28, sub-s. 4, the opium farmer is empowered, with the consent in writing of the superintendent, to import or export chandu by sea into or from any of the ports subject to the Harbours Ordinance, 1872, of which admittedly Singapore is one. By exception (*a*) in s. 28 opium or chandu, not being sea stores, found on board any ship whose registered tonnage exceeds fifty tons, which enters the waters of the Colony on a journey to any place, is presumed to be imported, unless it is not intended that she should stop or unload, or does not in fact stop or unload, at some place within the Settlement.

By s. 68 "every person who shall import, or aid, abet, procure,

or be interested or concerned in, or knowingly derive any profit from, the importation of any chandu contrary to the provisions" of the Ordinance, is rendered liable, in the case of a first offence, to a fine not exceeding $1000, or to imprisonment with or without hard labour for a period not exceeding three months, or to both fine and imprisonment, and in the case of a second and every subsequent offence to a fine not exceeding $3000, or to imprisonment with or without hard labour for a period not exceeding twelve months, or to both fine and imprisonment. By s. 69 it is made an offence in any person to receive into or have in his possession, custody, or control any opium or chandu not knowing, or having reason to believe, the same to have been lawfully imported or lawfully manufactured; the burden of proving the facts which exculpate being apparently thrown upon the accused. By s. 72, every person who conceals opium or chandu in any part of a ship, or who, being cognizant of opium or chandu being so concealed, does not take the earliest opportunity of reporting the same to the master of the ship, is rendered liable to a fine not exceeding $3000. It is not suggested that it was not intended that the *Devawongsee* should stop and unload at Singapore, or that she did not in fact do so. She must therefore, under the above-mentioned exception, be taken to have been engaged in the importation into that port of the chandu found in the lifeboat. If this be so, these sections cover the case of the master and of every other person as to whom the prosecution were in a position to prove that they either concealed the chandu, or knew it was concealed, and failed to report that fact to the master—the master under s. 68, the other persons under s. 72. Sect. 73 cannot be assumed to be purposeless. It must be taken to have been introduced into the Ordinance to effect some object, and it cannot effect any object not already effected, unless it be held to apply to cases where chandu is in fact imported, but the prosecution have not the means of proving by whose aid, assistance, or procurement, or with whose privity or consent, or in whose interest or for whose profit that was done. And accordingly the person who owns the ship, and the master who navigates her, are made responsible for the importation prohibited by the Ordinance, the burden of

J. C. 1909 BRUHN v. REX.

exculpating themselves in the manner prescribed in the sub-section being thrown upon them. Without some such provision as this evasion of the Ordinance would be easy, and the importation of chandu could not be effectively checked.

The other point relied upon on behalf of the appellant was that there should be proof, express or implied, of a mens rea in the accused person before he could be convicted of a criminal offence. But that depends upon the terms of the statute or Ordinance creating the offence. In many cases connected with the revenue certain things are prohibited unless done by certain persons, or under certain conditions. Unless the person who does one of these things can establish that he is one of the privileged class, or that the prescribed conditions have been fulfilled, he will be adjudged guilty of the offence, though in fact he knew nothing of the prohibition. By this Ordinance every person other than the opium farmer is prohibited from importing or exporting chandu. If any other person does so, he prima facie commits a crime under the provisions of the Ordinance. If it be provided in the Ordinance, as it is, that certain facts, if established, justify or excuse what is prima facie a crime, then the burden of proving those facts obviously rests on the party accused. In truth, this objection is but the objection in another form, that knowledge is a necessary element in crime, and it is answered by the same reasoning.

Some criticism was directed to the expression used by the magistrate who adjudicated in the case, that he " had no option but to convict the accused." What it appears to their Lordships he must have meant was this, that since what the Ordinance deemed prima facie evidence of the crime was not rebutted or explained, either in the manner indicated in the Ordinance or otherwise, he felt himself bound to act upon it. And in that opinion their Lordships are disposed to concur.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs of it.

Solicitors for appellant: *Loughborough, Gedge, Nisbet & Drew.*
Solicitors for respondent: *Speechly, Mumford & Craig.*

[PRIVY COUNCIL.]

GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } APPELLANTS;

AND

ROBERTSON . . . . . RESPONDENT.

J. C.*
1909
Feb. 15, 17.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Province of Canada 16 *Vict. c.* 37, *s.* 3 — *Dominion Railway Act*, 1906 (6 *Edw.* 7, *c.* 42)—*Construction.*

Sect. 3 of 16 Vict. c. 37 (Province of Canada) is not inconsistent with or impliedly repealed by the Dominion Railway Act, 1906 (6 Edw. 7, c. 42).

Accordingly the appellants are bound to carry third-class passengers for the fare of a penny per mile, and to provide one train every day with third-class carriages between Toronto and Montreal.

APPEAL by special leave from a judgment of the Supreme Court (December 13, 1907) affirming a judgment of the Board of Railway Commissioners for Canada (July 4, 1907).

The question raised in this appeal and also before the Supreme Court was limited to this: Whether that portion of s. 3 of the special Act of the Province of Canada (as it then was) incorporating the Grand Trunk Railway Company of Canada, 1852 (16 Vict. c. 37), which required that the fare or charge for each third-class passenger by any train on the railway of the said company should not exceed one penny currency for each mile travelled, and that at least one train having in it third-class carriages should run every day throughout the length of the line of the said railway, is now in force.

Under s. 26 of c. 37 of the Revised Statutes of Canada, 1906, the respondent applied to the Board of Railway Commissioners for Canada alleging that it was in the interests of the public that the Grand Trunk Railway Company of Canada should be compelled to perform its statutory obligations. The obligation sought to be enforced was that under the said s. 3 the company was

* *Present:* LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and LORD GORELL.

J. C. 1909 GRAND TRUNK RAILWAY OF CANADA v. ROBERTSON.

bound to carry third-class passengers for the fare of a penny per mile for each mile travelled, and to provide that at least one train having in it third-class carriages shall run every day throughout the length of its line between Toronto and Montreal.

Sect. 3 of the special Act is as follows: "And be it enacted, that the gauge of the said railway shall be five feet six inches; and the fare or charge for each first-class passenger by any train on the said railway shall not exceed two pence currency for each mile travelled, the fare or charge for each second-class passenger by any train on the said railway shall not exceed one penny and one halfpenny currency for each mile travelled, and the fare or charge for each third-class passenger by any train on the said railway shall not exceed one penny currency for each mile travelled; and that at least one train having in it third-class carriages shall run every day throughout the length of the line." The clauses with respect to "tolls" in the Railway Clauses Consolidation Act (14 & 15 Vict. c. 51) were by s. 2 of the special Act made a part of that Act.

The part of s. 3 dealing with the gauge of the railway was repealed by an Act of the Parliament of Canada, namely, 36 Vict. c. 18, s. 23.

The appellants contended before the Railway Board that the provisions of the special Act of 1852 had been impliedly repealed by subsequent legislation, and relied on Railway Act of Canada, 1903 (3 Edw. 7, c. 58), c. 37, R. S. C., 1906, s. 6, which is as follows: "Where any railway the construction or operation of which is authorized by a special Act passed by the legislature of any province is declared by any Act of the Parliament of Canada to be a work for the general advantage of Canada, this Act shall apply to such railway and to the company constructing or operating the same, to the exclusion of such of the provisions of the said special Act as are inconsistent with this Act and in lieu of any general railway Act of the province."

The Chief Commissioner, Killam J., after a detailed examination of the relevant legislation, ruled that the clause of the special Act of 1852 requiring the running of third-class carriages and limiting third-class fares was not affected by any legislation prior to the Railway Act of 1903. The material passages of his

judgment are as follows: "As has been said, the provisions of the special Act have not been expressly repealed. None of the enactments in the Railway Act, 1903, or in the present Railway Act, are explicitly inconsistent with those provisions. The contention on the part of the railway company is that, in effect, those enactments, and particularly the portions relating to tolls and those giving the Board jurisdiction respecting the accommodation, &c., to be furnished by the company, are so inconsistent as impliedly to repeal the provisions of the special Act. . . . .

"Under the Railway Clauses Consolidation Act and all the succeeding legislation, down to the Act of 1903, railway tolls were subject to the approval of, and to be altered by, the Governor in Council. This limitation upon the company's powers was embodied in the special Act by reference to the general Act. The jurisdiction of the Governor in Council could exist, therefore, consistently with the limitation as to fares imposed by the special Act, and it does not appear to me that the substitution of the Board of Railway Commissioners as the body which is to approve, and which has the jurisdiction to alter, railway tolls makes any change in this respect. Under the former legislation, all the railway tolls required the approval of the Governor in Council; under the present, it is only the standard or maximum tariffs which must be approved by the Board; and railway companies are authorized to make special tariffs imposing tolls lower than those in the standard tariffs. The practice has been for the companies to obtain approval of standard passenger tariffs, not distinguishing between classes, and to provide for second-class fares by special tariffs. Third-class fares could be provided for in the same way. I do not think that the provisions requiring special tariffs are necessarily inconsistent with the limitations imposed by the special Act or that they are sufficient to indicate the intention of Parliament that the company, in framing special tariffs, was to be free from such limitations. . . . .

"The imposition of this system was one of the terms and conditions upon which the company was granted its franchise, and it should not readily be presumed that Parliament intended to relieve the company from such terms and conditions."

J. C.
1909
GRAND TRUNK RAILWAY OF CANADA v. ROBERTSON.

The Supreme Court affirmed the judgment of Killam J. substantially for the reasons stated by him.

Sir R. Finlay, K.C., and *D. L. McCarthy, K.C.*, for the appellants, contended that the judgment should be reversed. The appellant company had in 1853 entered into an amalgamation agreement with other railway companies which in 1854 was confirmed by 18 Vict. c. 33 (Province of Canada). A new company was thus created, authorized to construct a new undertaking, and by that Act of 1854 and the Railway Act of 1859 the right to vary passenger tolls was vested in the directors of the new company. If the pre-confederation statutes were no longer in force after confederation, then the defendants were subject to the Dominion Railway Acts of 1868 and 1879, whose provisions in regard to tolls completely overrode and repealed the clauses regarding tolls in the appellants' special Act of 1852. On the other hand, if the new company and undertaking are still subject to the provisions of the special Act of 1852, the provisions of the Railway Act of 1883 (see s. 12, sub-s. 6) are so inconsistent therewith that the clause therein relating to tolls could not still remain in full force. Besides, the wide powers vested in the Board of Railway Commissioners by the Railway Act of 1903 and the amending Act of 1906 (being c. 42) are inconsistent with their being tied down by the Act of 1852 to specific defined rates and mode of travel. If this Board can vary the type of car and accommodation as they please, they must surely be allowed to change the fare. It was contended that provisions contained in the special Act with regard to tolls were quite inconsistent with the later Acts of 1903 and 1906 and must be deemed to have been repealed.

Hamar Greenwood and *Horace Douglas*, for the respondent, contended that the statutory duty imposed on the appellants by s. 3 of their special Act was clear and express. The Board of Railway Commissioners held in effect that s. 3 had never been repealed, is not inconsistent with any subsequent enactment, and is of full force and effect. It was contended that that ruling was right. So long as s. 3 stands the respondent is entitled to have it enforced. The Acts of 1903 and 1906 were not inconsistent

with the Act of 1852, for the powers given thereby to the Board were to enforce the provisions of that Act, not to alter, amend, or vary them. It is said that those provisions are now out of keeping with the practice of railroading as adopted in Canada. However that may be, the Act is in force, and if any inconvenience results it must be endured until the section in question is repealed.

Sir R. Finlay, K.C., in reply.

1909.
Feb. 17

The judgment of their Lordships was delivered by

LORD LOREBURN L.C. The question on this appeal really is whether or not s. 3 of the Act of the late Province of Canada of 1852 (16 Vict. c. 37) is impliedly repealed by the Dominion Railway Act of 1906 (6 Edw. 7, c. 42), which is to prevail when the provincial Act is inconsistent with it. The argument resolves itself into this: Is that section of the provincial Act inconsistent with the general Act of 1906? Their Lordships cannot think that it is. The requirement to run a third-class train may be incompatible with the Canadian practice, but it is an unrepealed part of the section of the provincial Act. It may be inconsistent with business or other conveniences; but no argument has been urged to shew that it is inconsistent with the later Act, and if it is not inconsistent, why is not the portion which relates to tolls and third-class passengers also to stand? The company is to prepare a tariff of tolls with reference to the statutory duties of the company, one of which is to be found in the third section of the Act of 1852. The result may be unfortunate, and the omission to repeal the third section may perhaps have been an oversight. Their Lordships cannot pronounce an opinion whether a section is continued by oversight or design; still less can they determine a case upon conjectures.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal. The appellants will pay the respondent's costs as between solicitor and client in accordance with the undertaking given when special leave to appeal was granted.

Solicitors for appellants: *Batten, Proffitt & Scott.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1909

Feb. 17, 18, 19, 20; *March* 23.

UNITED SHOE MACHINERY COMPANY OF CANADA . . . . . } PLAINTIFFS;

AND

BRUNET AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Leases of Machines for Shoe Manufacture—Restrictive Condition as to User—Prohibition to use other than Machines leased by Plaintiff—Restraint of Trade—Alleged Misrepresentation—Election to treat Leases as Valid.

By various leases in 1903 and 1904 the appellants leased to the respondents for twenty years machines made and used for certain processes in the manufacture of shoes, containing in each case a "tying clause," the effect of which was to prohibit the use by the respondents in the said manufacture of any machines not leased by the appellants. Some additional leases were granted of other and allied machines to be used for certain ancillary processes in the same manufacture. These latter the respondents called upon the appellants to remove, but continued to work the former in conjunction with machines not leased to them by the appellants.

To an action for an injunction and damages the respondents pleaded that the appellants, by false representations that they were patentees in respect of their machines, had induced them to take the said leases; and that the covenants therein, by reason of their unjust and oppressive nature and of the practical monopoly which the appellants had acquired in Canada in the manufacture and supply of shoemaking machinery, were in restraint of trade and void:—

Held, that as the respondents had not repudiated the leases after discovery of the alleged false representations, but had continued to work the demised machines and paid the royalties reserved, they had elected to treat the leases as subsisting, and could not afterwards avoid them. As the tying clauses merely prescribed the mode of user, and were not severable from the rest of the contracts, they could not be separately repudiated.

Held, further, that the covenants were not in restraint of trade. The shoe manufacturers of Canada were at liberty to hire or not to hire the appellants' machines on the appellants' terms as they pleased. The appellants were at liberty to prescribe the terms so long as they were

---

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and LORD GORELL.

not illegal, and were under no obligation to produce and dispose of their manufacture on terms similar to those imposed on patentees by the Canadian Patent Act.

APPEAL from a judgment of the Court of King's Bench (Appeal Side) (June 26, 1907) affirming a judgment of the Superior Court for the Province of Quebec (March 30, 1906), which, in accordance with the verdict of the jury, dismissed the appellants' action.

On July 3, 1905, the appellants sued for an injunction and damages under the circumstances stated in their Lordships' judgment and the above note, the respondents' defence being in effect (1.) that the leases sued on were void or voidable as having been obtained by misrepresentation on the part of the appellants; and (2.) that the leases sued on or the prohibitive clauses therein were void and unenforceable as being contrary to public policy in two respects, namely, as creating or tending to a monopoly and as being in restraint of trade. By their plea the respondents asked that all the leases proceeded on in the action might be declared null and void and be set aside and annulled, and they further declared their option that the action should be tried before a jury.

Certain interlocutory proceedings (of the nature of demurrer and as to the mode of trial) then took place, and eventually the Court of King's Bench declared the respondents entitled to a trial with a jury.

The action was heard by Cimon J. and a special jury of traders, whose findings, so far as are now material, are given in their Lordships' judgment. The judgment founded thereon and affirmed in appeal set aside and declared void the leases sued on and dismissed the appellants' action.

The judgment of Lavergne J. in the Court of Appeal contains the following passage:—

"It results from the answers of the jury that—

"(1.) The plaintiffs represented to the defendants, to the public generally, and to shoe manufacturers in Quebec that they were patentees in Canada of the several machines; that they alone had the right to manufacture and license the use of said machinery in Canada;

J. C.
1909
UNITED SHOE MACHINERY COMPANY OF CANADA v. BRUNET.

"(2.) These declarations and representations were false;

"(3.) The plaintiffs have the control, in this province, the absolute control, of that essential machinery;

"(4.) The terms of the leases create a monopoly in favour of the plaintiffs not only of the machinery but also of a part, a substantial part, of the material used with the machinery;

"(5.) The manufacturers not being able to get this machinery elsewhere, the plaintiffs exact from them these terms and conditions;

"(6.) The said contracts and the several provisions thereof are not reasonably necessary for the protection of the lawful rights of the plaintiffs.

"These facts, according to me, amply justify the judgment rendered in this case."

He held that the verdict was well supported by the evidence, and upon the law as to restraint of trade he said:

"When a contract is against public order (C. C. 990) or public policy the law says it is void. Now a contract in restraint of trade might be a contract against public policy, and if so it would be void, it would have no effect (C. C. 989, 990).

"The public have an interest in every person carrying on his trade freely. So has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy; and therefore void.

"Restraint of trade and interference with the individual liberty of action may be justified by the special circumstances of a peculiar case. It is a sufficient justification and indeed it is the only justification, if the restraint is reasonable—reasonable, that is, in reference to the interest of the parties concerned, and reasonable in reference to the interests of the public; so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed while at the same time it is in no way injurious to the public. That is a fair result of all the authorities.

"A monopoly is rightly defined as a combination the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public."

Trenholme J. dissented from the judgment of the majority upon the point of the leases being in restraint of trade or contrary to public policy, though he agreed that they were based upon false and fraudulent misrepresentations on the part of the company that they held patents for their machines. He said: "I do not see that the jury have found even that these leases constitute an illegal monopoly. We see that their finding constitutes a monopoly, but to what extent they are a burden to the public they cannot say. It may mean that they are no burden to the public at all; that there is no legal monopoly, and no restraint of trade that the Court could consider as sufficient to set aside the contract for, unless it be injurious to the public. This is the very essence of a monopoly or of restraint of trade that will constitute a ground for setting aside a contract.

"Therefore, in my point of view, the contracts were not in restraint of trade and do not constitute a legal monopoly, and on this ground I have to dissent from the judgment to be given."

Sir R. Finlay, K.C., and *Astbury, K.C.* (*Casgrain, K.C.*, and *Sargant* with them), for the appellants, contended that there was no evidence that the appellants had represented that their machines were patented and that they owned or controlled the patents, or that any representations to that effect were false, or that in reliance thereon the respondents were induced to take the leases sued on. On the contrary it was proved that they took the leases on account of the superior efficiency of the appellants' machines, and never repudiated them after their alleged discovery of misrepresentation, but continued to use them and paid royalties for them up to the date of the action. It was contended that this continued user with full knowledge was an affirmance of the leases and inconsistent with a claim to repudiate. There was no evidence that the provisions of the leases sued on, with or without those of the allied leases, created any monopoly in favour of the appellants, still less an illegal monopoly. So far as they had any monopoly by virtue of patents it was created by the Legislature; otherwise it was one legitimately created by the superior excellence of the machines which they brought into the market. The next question was whether the tying clauses in the leases were

J. C. 1909 — UNITED SHOE MACHINERY COMPANY OF CANADA v. BRUNET.

contrary to public policy and void as being in restraint of trade beyond what was necessary for the reasonable protection of the appellants. The parties deliberately assented to certain terms on which the appellants' machines were to be hired and used, and it was contended that they were not unduly restrictive. They did not restrict the process of manufacture, but merely provided that if the respondents used the appellants' machinery at all they should use it entirely and not combine with it the use of other machinery which was in competition with it. There was no restraint on trading, but there was a restraint on the use of certain leased chattels, and it was for the Court to decide whether the restraint was reasonable. It was contended that the effect was to give to the appellants a reasonable protection in respect of their machinery, such as they were entitled to stipulate for. Reference was made to *Jones* v. *Lees* (1); *Incandescent Gas Light Co.* v. *Cantelo* (2); *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3); *Mallan* v. *May* (4); *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (5); *Leather Cloth Co.* v. *Lorsont* (6); *British United Shoe Machinery Co.* v. *Somervell Brothers.* (7)

G. G. Stuart, K.C., and *Horace Douglas* (*Hamar Greenwood* with them), for the respondents, contended that the evidence fully supported the findings of the jury to the effect that the appellants' representations that their machines were patented and that they had the control of the patents and the exclusive right to manufacture their machinery in Canada were false and fraudulent. Under all the circumstances of the case the continued user of the machines for little more than two months after the discovery of the misrepresentations was so essential to the conduct of their business that it did not amount to an election to treat the leases as still subsisting. A reasonable time had not elapsed. It was contended that the contracts contained in the leases were in restraint of trade and illegal, and a means whereby the appellants imposed upon the respondents

(1) (1856) 1 H. & N. 189.
(2) (1895) 12 Rep. Pat. Cas. 262, 265, 266.
(3) [1894] A. C. 535.
(4) (1843) 11 M. & W. 653, 668.
(5) [1892] A. C. 25.
(6) (1869) L. R. 9 Eq. 345.
(7) (1906) 95 L. T. 711.

and upon shoe manufacturers generally and upon the public a monopoly of the supply of shoe machinery. They were in contravention of the requirements of the Canadian Patent Act, assuming that the machines were patented and the patent still in force. The jury had found that the contracts were not reasonably necessary for the protection of the lawful rights of the appellants. It was an unreasonable and oppressive provision that any manufacturer who signed leases of this kind was bound for life, being then at the mercy of his lessor (a foreign company), and could never take machinery, however superior or improved, from any other source. They referred to *Power* v. *Griffin* (1); also to a passage in the judgment of Bowen L.J. in the case of *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (2), in which it is pointed out that cases may occur in which the absolute restraint might as between the parties be reasonable, but yet might tend directly to injure the public, particularly if it was calculated to create a pernicious monopoly in articles for public use: see also *Lindsay Petroleum Co.* v. *Hurd* (3); the Case of Monopolies, *Darcy* v. *Allein* (4); *Dowden and Pook* v. *Pook*. (5)

Sir R. Finlay, K.C., replied.

1909
March 23.

The judgment of their Lordships was delivered by

LORD ATKINSON. In this case the plaintiffs appeal from the final judgment, dated June 26, 1907, of the Court of King's Bench for the province of Quebec (Appeal Side), affirming a judgment, dated March 30, 1906, of the Superior Court of that province, whereby certain contracts entered into between the appellants and the respondents were declared to be null and void and the action of the appellants for an injunction to restrain the respondents from continuing to violate some of the most material provisions of these contracts, and to recover damages for past breaches of the same, was dismissed.

The appellants are a New Jersey corporation licensed to do business in the province of Quebec. They are, moreover, a

(1) (1902) 33 Can. Sup. Ct. Rep. 39.
(2) [1893] 1 Ch. 630, 667.
(3) (1874) L. R. 5 P. C. 221, 239.
(4) (1603) 11 Rep. 84b, 86.
(5) [1904] 1 K. B. 45.

J. C. 1909 — UNITED SHOE MACHINERY COMPANY OF CANADA v. BRUNET.

company subsidiary to the United Shoe Machinery Company of Boston, and are manufacturers in Canada of certain machines, and importers into Canada of other machines, made and used for certain processes in the manufacture of shoes.

The respondents are a firm engaged in the manufacture, in the city of Quebec, of boots and shoes, and are supported in the litigation out of which this appeal arises by one Ernest Caron, who is a manufacturer in Canada of shoemaking machinery, which competes, more or less successfully, with that of the appellants.

By various leases dated on various dates between October 22, 1903, and June 22, 1904, the appellants leased to the respondents for a term, in each case, of twenty years the following machines amongst others: One Stanbon McKay channelling machine, one Stanbon lip-turning machine, three Power eyeletting machines, and four Consolidated Hand Method lasting machines. These leases were in the litigation referred to as the "leases sued on."

Each of the leases contained a prohibitive clause, referred to in argument as the "tying clause," of which that in the lease of the Stanbon machines may be taken as a specimen. It runs as follows: "The leased machinery shall not nor shall any part thereof be used in the manufacture of any boots, shoes, or other footwear which are or shall be welted or the soles stitched on welt sewing or sole stitching machines not leased to the lessee by the lessor or its assignor, or in the manufacture of any turn boots, shoes, or other footwear the soles of which are or shall be attached to their uppers by turn sewing machines not leased to the lessee by the lessor or its assignor, or in the manufacture of any boots, shoes, or other footwear which have been or shall be lasted, pegged, slugged, heel seat nailed, or otherwise partly made by the aid of any lasting or pegging or metallic machinery not leased to the lessee by the lessor or its assignor."

In addition to the "leases sued on" the appellants granted to the respondents leases of other, and additional, machines, referred to in the case as "the allied machines," whose function was to perform certain processes in the manufacture of shoes, ancillary to those performed by the machines first mentioned. These

different machines, the jury found, did not "necessarily form one complete system," but the leases stipulated that they should be "used as a complete system."

It is clear from the evidence of Michel Brunet, the only member of the respondents' firm examined at the trial, that his firm had been dealing with the appellants for shoemaking machinery of this kind for a number of years; that in or about the year 1903 the respondents' firm obtained from Ernest Caron machines somewhat similar to those of the appellants, and used them in conjunction with machines obtained from the appellants; and that the appellants' agent then induced the respondents to put Caron's machines aside, and to obtain from his principals the machines demised by the "leases sued on." The respondents alleged that the appellants' agent effected this by pointing out to Brunet that by using Caron's machines they were exposing themselves to an action at the suit of the appellants, not only for damages for breach of their contract, but also for infringement of the appellants' patents.

On May 15, 1905, the respondents wrote to the appellants informing them that they (the respondents) had discontinued the use of the five "allied machines" therein mentioned and requesting the appellants to remove them from the respondents' factory. The appellants not having complied with this request, it was repeated by the respondents in a more peremptory form in their letters of June 5 and 19 following.

On July 3, 1905, the appellants applied to the Superior Court of Quebec for, and on July 21, 1905, obtained from that Court, an interlocutory injunction restraining the respondents from using, in the manufacture of shoes, the machines demised by the "leases sued on" in conjunction with machines not leased to them by the appellants. On the same day, July 21, 1905, the appellants filed their declaration in the action, complaining that the respondents, in breach of the covenants contained in the "leases sued on," had used, and were continuing to use, in the manufacture of shoes the machines thereby demised in conjunction with the other machines therein named, not leased or supplied to them by the appellants, and that they threatened to continue so to do, and praying that the interlocutory injunction

J. C. 1909

UNITED SHOE MACHINERY COMPANY OF CANADA v. BRUNET.

already obtained might be declared to be perpetual, and that the respondents might be condemned to pay to them damages to the amount of $10,000 and costs.

The respondents on September 30, 1905, filed their plea to this declaration. It is very voluminous and somewhat involved. In effect it amounts to this—

(1.) That the appellants, by falsely representing to the respondents that they, the appellants, were the patentees of the machines mentioned in the "leases sued on," induced them to take the said leases and enter into the covenants contained in them, and (2.) that, by reason of the practical monopoly which the appellants had acquired in Canada in the manufacture and supply of shoemaking machinery, the covenants contained in the "leases sued on" were in restraint of trade, and, therefore, illegal and void as against public policy. On these pleadings issues, twenty-two in number, were ultimately framed by the Court with the assistance of counsel representing the parties; and on the application of the respondents the case was ordered to be tried before a judge and jury.

It will in the first instance be convenient to consider these two defences separately.

To maintain the first, the burden rested on the respondents of establishing, either by the admission of the appellants or by the findings of the jury, the following conclusions of fact: (1.) that the representations complained of were made by the appellants to the respondents; (2.) that these representations were false in fact; (3.) that the appellants, when they made them, either knew they were false or made them recklessly without knowing whether they were false or true; (4.) that the respondents were thereby induced to enter into the covenants contained in the leases; and (5.) that immediately on, or at least within a reasonable time after, their discovery of the fraud which had been practised upon them they elected to avoid the leases and accordingly repudiated them.

Of these the last is the most vital, in the sense that it is the condition precedent which must be fulfilled before the respondents can escape from the obligations of the contracts they have entered into, however fraudulent those contracts may be.

A contract into which a person may have been induced to enter by false and fraudulent representation is not void, but merely voidable at the election of the person defrauded, after he has had notice of the fraud. Unless and until he makes his election, and by word or act repudiates the contract, or expresses his determination not to be bound by it (which is but a form of repudiation), the contract remains as valid and binding as if it had not been tainted with fraud at all: *Clough* v. *London and North-Western Ry. Co.* (1), approved by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (2) and by Lords Watson and Davey in *Aaron's Reefs* v. *Twiss.* (3) In the first-mentioned case Mellor J. says (4): "The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture he, by the receipt of rent or other unequivocal act, shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease."

In the present case it was proved in evidence, and not disputed, that, though the respondents had on May 15, 1905, if not before, so satisfied themselves that they had been defrauded that they called upon the appellants to remove the "allied machines," yet they retained in their hands, and continued to work, the machines demised by the "leases sued on" up to July 21, 1905, the date of the interlocutory injunction, and paid in respect of this period the royalties reserved by these leases. In no more emphatic, or unequivocal, way could the respondents have shewn their intention to treat the leases as subsisting. In the face of this evidence it is natural that the plea does not contain an averment that the respondents repudiated the "leases sued on." That matter is, however, obviously disposed of by the findings of the jury in answer to questions Nos. 7 and 8 left to them.

These answers run as follows:—Answer to question 7: Between May 15 and July 15, 1905, the defendants did use the machines named [i.e., demised by the leases sued on] in

(1) (1871) L. R. 7 Ex. 26.
(2) (1878) 3 App. Cas. 1218, at pp. 1277-1278.
(3) [1896] A. C. at pp. 290 and 224.
(4) L. R. 7 Ex. at p. 34.

J. C. 1909

UNITED SHOE MACHINERY COMPANY OF CANADA v. BRUNET.

connection with other machinery not leased from the plaintiffs. —Unanimous.

Answer to question 8: The defendants proved by their acts that they did not intend to be bound by this clause [i.e., the tying clause].

These answers taken together amount, at the least, to a finding that the respondents did not, before action brought avoid the contract, if not to a finding that they affirmed it. For the party defrauded cannot avoid one part of a contract and affirm another part, unless indeed the parts are so severable from each other as to form two independent contracts. Nothing of the kind exists in the present case, for the covenant in the lease which is objected to merely prescribes the mode in which the thing demised is to be used.

For these reasons their Lordships are clearly of opinion that the respondents have failed to sustain their first defence, and they therefore think it is unnecessary to consider the question of the alleged misdirection by the learned judge at the trial as to the party on whom rested the burden of proving that the machines demised by the leases sued on were not patented.

It remains to consider the second defence. It is very lengthy, and extremely novel in character, but in substance and effect it amounts to this:

The appellants, the respondents allege, are manufacturers on an extensive scale in Montreal of shoemaking machinery of the most modern and improved type, which they refuse to sell, and will only consent to lease, or hire out, on terms similar to those contained in the "leases sued on." They further say that the appellants have acquired a practical monopoly of the manufacture of shoemaking machinery by the combined operation of the three causes following: (1.) the superior excellence of their manufacture; (2.) the belief entertained in Canada by manufacturers of shoes who require machinery of this kind for the successful conduct of their trade, as well as by the general public, that the appellants hold patents for all the machines produced by them, and that machines similar to those of the appellants could not be obtained from others or used in Canada without incurring the risk of being sued for infringement of the appellants'

patents; and (3.) the operation of the clauses contained in the latter's leases, especially the so-called "tying clauses." The respondents further alleged that the above-mentioned belief is engendered in those who entertain it by the false and fraudulent representations, made by the appellants to their customers and to those members of the public with whom they come in contact, that they, the appellants, hold patents for all the machines they produce; that the terms of the appellants' leases are unjust and oppressive, hamper shoe manufacturers in their business, are injurious to the public, and operate in restraint of trade, but that the manufacturers nevertheless take them because they are, for the reasons above mentioned, under the impression that they have no alternative, and must either hire the machines on the appellants' terms or do without them altogether; and, further, that if the appellants were, as they alleged, the holders of patents for their machines the Canadian Patent Act (55 & 56 Vict. c. 24) applied, and that, in the events which had happened, either the patents were forfeited or, if not, the patentees were bound to sell or hire these machines on reasonable terms.

The question whether or not a contract is in restraint of trade, and therefore void in law, is a question of law for the determination of the Court. And it is to be assumed that several of the questions left to the jury in this case were so left in order that they might find certain issues of fact necessary to be ascertained to enable the judge at the trial to decide whether or not the covenants by the lessees contained in the "leases sued on" were void for this reason; while four of them, namely, Nos. 18, 19, 20, and 21, were apparently framed in reference to the provisions of the above-mentioned Act. But the answers of the jury to the questions so left to them are in some instances irreconcilable, and in one at least the answer is ambiguous. For instance, in reply to question 12 they find that the alleged declarations and representations made by the appellants to the effect that each of the machines referred to in the agreements mentioned in the declaration was patented, and that they, the appellants, controlled these patents and had the sole right to manufacture these machines in Canada, were "false and fraudulent"; while in answer to questions 19 and 20 they

J. C. 1909 — UNITED SHOE MACHINERY COMPANY OF CANADA v. BRUNET.

find that no proof was given that the appellants were patentees of, or owned patents covering, the very same machines. But the basis of the first finding necessarily must have been that these machines were in fact not patented, and that the appellants did not in fact control the patents. Otherwise the statement to the contrary could not be false. Thus the failure to prove the affirmative proposition that a certain thing existed or has taken place is treated as proof of the negative proposition that it did not exist or had not taken place.

Again, the jury, having found that the existence of the patents was not proved, most naturally abstained from finding, in reply to question 20, that the appellants carried on in Canada the construction or manufacture of the machines referred to in such a manner that any person desiring to use them could obtain, or cause to be made for him, what he required, at a reasonable price, at some manufactory in Canada, since these issues had become immaterial. And, lastly, the jury abstained from finding, in reply to question 21, that the monopoly which the appellants' leases had in effect created hampered, or unjustly oppressed, the manufacturers of shoes in Canada, or imposed a great burden on the public. Their answer to the question is, "That it is a monopoly. We do not say how far it is a burden on the public," which may mean that it is no burden at all, or is not an appreciable burden, or is a real burden, but that they cannot measure the extent or weight of it. The findings of the jury, therefore, dispose completely of all questions arising on the Patent Act, as, indeed, they also dispose of all the charges of fraud and coercion, since they remove the foundation on which the first charge rests, and their answer to question 19 limits the latter to the presentation to the shoe manufacturers of Canada of the alternative of either doing without these machines altogether, or of hiring them on terms identical with or similar to those contained in the "leases sued on." This alternative, however, does not subject the would-be customers of the appellants to any coercion beyond what their desire to promote their own trade interests imposes upon them. By virtue of the privilege which the law secures to all traders, namely, that they shall be left free to conduct their own trade in the manner

which they deem best for their own interests, so long as that manner is not in itself illegal, the respondents are at liberty to hire or not to hire the appellants' machines, as they choose, irrespective altogether of the injury their refusal to deal may inflict on others. The same privilege entitles the appellants to dispose of the products they manufacture on any terms not in themselves illegal, or not to dispose of their products at all, as they may deem best in their own interest, irrespective of the like consequences. This privilege is, indeed, the very essence of that freedom of trade in the name and in the interest of which the respondents claim to escape from the obligations of their contracts: *Hilton* v. *Eckersley* (1), approved of in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2) The latter case, indeed, affords a striking example of the lengths to which traders, in the bona fide defence or promotion of their own trade interests, may lawfully push this privilege, regardless of the injury, clearly foreseen by them, which they may thereby incidentally inflict on the trade of their rivals. It is not disputed that the machinery manufactured by the appellants is of a superior description, but it is contended that, if machinery superior to theirs should be put upon the market during the currency of these leases, the respondents, and others in the like position, would, to the vast injury of their trade, be by such leases prohibited from using those improved or superior machines. This, however, is a very remote contingency, since the appellants, having, as is alleged, captured the entire trade, are unlikely not to keep abreast of invention or to allow the field they have won to be occupied by others. Of course it will always be open to any individual trader who may be defrauded by the alleged false representation of the appellants to repudiate his contract, and, whether he repudiates or not, sue for damages in an action for deceit; but, putting aside fraud and coercion in this case, as the findings of the jury necessitate that they should be put aside, and also putting aside the possibility of the shoe manufacturers of Canada being obliged to use the inferior machines of the appellants while superior machines are on the market and available for use, the respondents' defence in effect resolves itself

(1) (1856) 6 E. & B. 47, at p. 74. (2) [1892] A. C. 25, at p. 36.

J. C. 1909

UNITED SHOE MACHINERY COMPANY OF CANADA v. BRUNET.

into a claim that the appellants are to be held to be under a legal obligation to produce and dispose of their manufacture on terms similar to those imposed by the Canadian Patent Act on patentees.

It may be quite reasonable and right that the State, in consideration of the valuable rights and privileges it confers by its patents, should, in the interest of the public, impose these terms and conditions on their patentees, but they cannot, in the alleged interest of the freedom of trade, of which they are in truth to a large extent the negation, be imposed upon persons who are not patentees, nor can contracts containing terms and conditions different from and more onerous on traders who are parties to them than those the State prescribes be held, solely because of that circumstance, to be in restraint of trade and void as against public policy. The validity of these contracts must therefore be judged apart altogether from the provisions of this statute.

With all respect to the learned judges from whose decision this appeal has been taken, their Lordships do not think that the case of *Nordenfelt* v. *Maxim Nordenfelt, &c. Co.* (1), or authorities of that class, can have any application to this case. In each of them the person restrained from trading had granted, presumably for adequate consideration, some property, privilege, or right to the person who desired to impose the restraint upon him, and, in order that the latter might receive, without injury to the public, that for which he had paid, the contract imposing the restraint was held to be valid only where the restraint was in itself reasonable in reference to the interests both of the contracting parties and of the public. If the monopoly established by the appellants and their mode of carrying on their business be as oppressive as is alleged (upon which their Lordships express no opinion), then the evil, if it exists, may be capable of cure by legislation or by competition, but in their view not by litigation. It is not for them to suggest what form the legislation should take, or by what methods the necessary competition should be established. These matters may, they think, be safely left to the ingenuity and enterprise of the Canadian people. On the

(1) [1894] A. C. 535.

J. C.
1909
UNITED SHOE MACHINERY COMPANY OF CANADA v. BRUNET.

whole, therefore, their Lordships are of opinion that the respondents' defences cannot be sustained, and that the appellants are entitled to have the injunction they obtained made perpetual.

As the respondents have broken their contract, the appellants must, despite the finding of the jury that they sustained no damage, be entitled to nominal damages, but to nothing more.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, that the judgments of the Court of King's Bench and the Superior Court should be reversed, that the interlocutory injunction obtained by the appellants on July 21, 1905, should be declared perpetual, and that judgment should be entered in favour of the appellants for nominal damages, say $1, and costs in both Courts.

The respondents will pay the costs of this appeal.

Solicitors for appellants: *Bristows, Cooke & Carpmael.*
Solicitors for respondents: *Stephenson, Harwood & Co.*

[PRIVY COUNCIL.]

J. C.*
1909
March 3, 18.

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } PLAINTIFF;

AND

COLLECTOR OF CUSTOMS FOR NEW SOUTH WALES . . . . . } DEFENDANT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Practice—Special Leave to Appeal—Australian Commonwealth Constitution Act, 1900, *s.* 74.

Special leave to appeal from a judgment of the High Court of Australia holding that goods imported by the State Governments are liable to duties of customs under the laws of the Commonwealth was refused although the case was within s. 74 of the Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12).

THIS was a petition by the plaintiff for special leave to appeal from a judgment of the Full High Court (May 23, 1908).

* *Present:* LORD ATKINSON, LORD COLLINS, LORD SHAW, and SIR ARTHUR WILSON.

J. C.
1909
ATTORNEY-GENERAL FOR NEW SOUTH WALES v. COLLECTOR OF CUSTOMS FOR NEW SOUTH WALES.

It stated that 2227 steel rails (60 lbs.) had been purchased and paid for in England by the State of New South Wales for the construction of the Government railways of the State, were consigned by the Agent-General of the said State in London to its Secretary for Public Works, and arrived at the port of Sydney in March, 1907, and that thereupon the defendant claimed customs duties thereon 539*l.* 18*s.* 1*d.* It further stated that the plaintiff, under s. 167 of the Customs Act, 1901, deposited the amount with the defendant under protest, and that in an action by him to recover the amount a special case was stated submitting questions of law for the opinion of the High Court, with the result that the High Court held that the various States of Australia are liable to the payment of duties of customs; that s. 114 of the Constitution Act does not exempt them; and that the duty was properly paid on the steel rails in question. The judgment is reported in 5 C. L. R. 818 and followed the decision in *Rex* v. *Sutton* at p. 789 of the same volume, holding that the rule that the Crown is not bound by a statute except by express words or necessary implication applies only to those representatives of the Crown who have executive authority in the place where the statute applies and as to matters to which that executive authority extends. The High Court held that the right of the State Governments to import goods is subject to the customs laws of the Commonwealth; also that a customs duty was not a tax within s. 114 of the Constitution Act.

Sir R. Finlay, K.C., and *Carpmael*, for the petitioner, contended that the question involved was one of great importance to all the States in the Australian Commonwealth. The railway systems are the properties of the respective States, and large quantities of goods of the description specified in the schedule to the Customs Tariff, 1902, will be frequently imported. They referred to s. 5 of the Constitution Act, 1900 (63 & 64 Vict. c. 12), and ss. 9, 51, 86, 90, and 114; Customs Act, 1901 (No. 6), ss. 131, 153, 167; Customs Tariff, 1902 (No. 14), ss. 5, 24, Sched. No. 79. The Constitution Act, s. 74, reserves the prerogative right to grant special leave to appeal.

Danckwerts, K.C., and *Rowlatt*, for the defendant, contended

that the case was not one in which special leave should be given, having regard to the questions of law raised by the special case.

J. C.
1909
ATTORNEY-GENERAL FOR NEW SOUTH WALES. v. COLLECTOR OF CUSTOMS FOR NEW SOUTH WALES.

The judgment of the Court was delivered by

LORD ATKINSON. In this case their Lordships are unable to advise His Majesty to grant special leave to appeal, solely on the ground that in their opinion the case comes within s. 74 of the Commonwealth of Australia Constitution Act. They do not desire to express, nor indeed have they formed, any decided opinion on the other points raised in argument.

In accordance with the usual rule in such cases, each party will bear his own costs of the petition.

Solicitors for petitioner: *Light & Fulton.*
Solicitor for respondent: *J. H. Galbraith.*

[PRIVY COUNCIL.]

STEPHAN AND ANOTHER . . . . . APPELLANTS;

AND

THE BOARD OF EXECUTORS, CAPE TOWN, AND OTHERS . . . . . RESPONDENTS.

J. C.*
1908
Nov. 26.
1909
Feb. 11, 12; *March* 31.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Construction of Will—Institution of Heirs in specified Proportions—Tenant for Life—Other Proportions in certain Assets sold during the Life Tenancy—Period of Distribution.

The testator died in 1900, his brother and partner in 1906. Under the will in the events which happened the brother took a life interest in the entire residue of the testator's estate, the instituted heirs being himself as respects one fourth thereof and certain "other heirs" represented by some of the respondents as respects three fourths.

The institution was subject to the condition that the brother besides his life interest was entitled to retain during his life the testator's half

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

J. C.
1909
STEPHAN
v.
CAPE TOWN BOARD OF EXECUTORS.

share of the partnership assets; distribution among the heirs being postponed till the brother's death, except in the case of a sale during his life, when the distribution of its proceeds was to be made at once, and if the sale was of partnership assets, in that case the shares should be altered to half and half.

The testator also directed that in order to avoid all disputes and differences an inventory and account should be made of his private estate and also of his firm, and that his "other heirs shall be paid out their three fourth shares in his private estate and one fourth share of his firm on the valuations and accounts as set forth and contained in the said inventory, whenever such payment may be made to them, and they shall not be entitled to claim any profits or gains made by the brother should he continue to carry on the business, nor on the other hand shall such heirs be responsible for any losses":—

Held, that on the true construction of this clause a partnership asset entered in the inventory but realized after the brother's death was distributable as regards the testator's moiety thereof in the proportion of three fourths and one fourth and not in the proportion of half and half.

APPEAL from a judgment of the Supreme Court (August 9, 1907).

The question at issue, which was stated in a special case, namely, in what proportion the appellants and respondents were entitled to share in a specified asset of the estate in suit, depended upon the construction of the will of Johan Carel Stephan, deceased. The material portions of the will are set out in the judgment of their Lordships.

The Supreme Court decided that the provision in clause 23 of the will, that the testator's heirs, other than his surviving brother, should be paid their three fourths in his private estate and one fourth of the partnership assets (i.e., one half of the testator's moiety thereof) on the basis of an inventory and valuation thereby directed whenever such payment might be made to them, applied only to such of the partnership property as might be realized during the brother's lifetime, on whose death the only direction was the institution of heirs in the proportion of one fourth and three fourths contained in clause 20 of the will.

Sir R. Finlay, K.C., and *E. F. Spence*, for the appellants, who represented those interested in the estate of the testator's brother, contended that on the true construction of the will read

as a whole the respondents were only entitled to one fourth of the partnership assets. Clauses 20 and 23 must be read together, and under them the respondents, though entitled to three fourths of the testator's private estates, were entitled only to one half of the testator's moiety of the partnership estate. Clause 23 relates to sales after the death of the testator's brother as well as before: see *H. R. Stephan* v. *Estate of J. C. Stephan.* (1)

Boxall, K.C., and *Mackarness*, for the respondents, contended that the "other heirs" were entitled to three fourths of the particular partnership asset in suit. The 20th clause of the will was the governing clause and applied to every case of distribution, unless in any specific case in which a different proportion was specially directed. That special direction only related to the distribution of assets realized during the brother's lifetime, and not to the cases contemplated by clause 23.

Sir R. Finlay, K.C., in reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships have to determine the meaning and effect of one clause in the will of Johan Carel Stephan, who died in February, 1900. The clause in question at first sight seems obscure, if not perplexing, but it appears to their Lordships that, if the testator's directions are followed attentively, all difficulty vanishes.

The testator, or "the appearer" as he is called in the will, which was declared before a notary, was entitled to one half-share in the business of Stephan Brothers carried on by him in partnership with his brother Hendrik; and he had separate property besides.

Hendrik survived the testator and continued to carry on the business during his life on his own sole account, as he was authorized to do by the will. In the events which happened he had a life interest in the entire residue of the testator's estate.

The question now at issue arose in the course of distributing the testator's estate on Hendrik's death, which occurred in 1906.

After providing for payment of debts and legacies the testator instituted as his heirs his brother Hendrik and certain other

(1) (1902) 12 Cape Town Rep. 242.

J. C. 1909

STEPHAN v. CAPE TOWN BOARD OF EXECUTORS.

persons named in the will who are referred to afterwards as "the other heirs."

The institution was subject to three conditions numbered I., II., and III. For convenience of reference the copy of the will before the Court is divided into clauses numbered consecutively in Arabic figures. Condition No. I. becomes clause 20. Condition No. II. is divided; it is comprised in clauses 21 and 22. Condition No. III. corresponds with clause 23.

By clause 20 the testator directed that one fourth of the residue of his estate should go to his brother Hendrik, and the remaining three fourths to the other heirs.

By clause 21 the testator declared that Hendrik should be entitled to the usufruct of the whole residue during his life. He was desirous, he said, of giving his brother every opportunity to carry on the business of Stephan Brothers "for his own account and profit and loss during his lifetime." But he made it a condition that if Hendrik should discontinue the business or take a partner into the firm, or float the same into a company, or otherwise change the personnel or status of the firm, then the other heirs should be entitled "to claim their three fourths of the estate."

Clause 22 provided that, if Hendrik decided to carry on the business and, whilst so carrying it on, disposed of any immovable property or received payment of any mortgage bonds belonging to the partnership business or to the separate estate, Hendrik should at once pay over to the other heirs one fourth part of the proceeds if derived from the sale or realization of partnership property, or three fourths if the property sold or realized was part of the testator's separate estate. A sale of all the landed property belonging to the firm was to be considered a discontinuance of the business, and "the heirs would in that event be entitled to their inheritances."

So far there is no difficulty. The scheme of distribution is clear. The residue of the estate was to be divided into fourths. Hendrik was to have one fourth, the other heirs three fourths between them. In the events which happened Hendrik became entitled to a life interest in the entire residue, and entitled also to retain in the business the testator's share of the partnership

assets during his life. The interest of the other heirs was postponed until Hendrik's death. But there was to be a partial distribution in the lifetime of the tenant for life in case of a sale or realization of certain specified assets under the circumstances mentioned in clause 22; and, moreover, if the assets so sold or realized formed part of the partnership property, the distributive shares of the tenant for life and the other heirs in the testator's moiety of the proceeds were to be half and half, instead of one fourth and three fourths respectively.

The present question is whether any further alteration is made in the scheme of distribution by the next clause, which is in the following terms:

"23. III. In order to avoid all disputes and differences, the appearer hereby declares it to be his will and desire that not longer than six months after his death a full and true inventory and account shall be taken of appearer's private estate and also that of Stephan Brothers, and that appearer's other heirs shall be paid out their three fourths' share in his private estate and one fourth share of the firm of Stephan Brothers, on the valuations and accounts as set forth and contained in the said inventory, whenever such payment may be made to them, and they shall not be entitled to claim any profits or gains made by the said Henry Rudolph Stephan should he continue and carry on the business, nor on the other hand shall such heirs be responsible for any losses."

On the strength of this clause, it is contended by the appellants that the provisions of clause 22 are to be extended to the distribution of the estate on the death of the tenant for life, or that at least as regards the assets that would have been distributable in moieties between the tenant for life and the other heirs, had they been realized in the lifetime of Hendrik, the same rule of division must hold good when the distribution takes place on Hendrik's death.

Now two observations arise on the clause. In the first place it is plain that it must have been intended that the inventory and valuation should be the basis of distribution in all cases. The testator declares that his object was "to avoid all disputes and differences." In the next place it is clear that, however the

J. C. 1909 STEPHAN v. CAPE TOWN BOARD OF EXECUTORS.

clause be construed, the intended basis of distribution is not in terms made applicable to every case. For instance, it is not applicable to a distribution of the estate in Hendrik's lifetime on the happening of one of the contingencies that would entitle the other heirs "to claim their three fourths of the estate." The clause is perfectly accurate in reference to the shares of the other heirs in the separate estate, and also, as it seems to their Lordships, in reference to the payment out of their one fourth share in the firm "whenever *such* payment may be made to them," that is, to take the words literally—and there is no reason why they should be taken otherwise—whenever the payment of the one fourth is made. But then the one fourth was only payable in the case of certain partnership assets being sold or realized during Hendrik's life. It is plain that some cases are not provided for in terms. There is some slip or omission. Perhaps it would be more accurate to say that there is an imperfect enumeration of particulars—a thing very likely to occur when no enumeration of particulars is required. But what is the consequence? Simply this, that the principle of division which is laid down clearly in clause 20 must apply in all cases not specially mentioned in clause 23. Nor will any difficulty or confusion arise in consequence of the omission. The last words of the clause, which are not superfluous, as the learned counsel for the appellants contended, but necessary and important, make it plain that the other heirs are not concerned with any increase or diminution in the value of the partnership assets while left in Hendrik's hands. So far as regards their interest, the value of the assets is fixed for good and all by the inventory and valuation.

The particular question for the decision of the Court arose in this way. Among the assets of the partnership estate at the death of Hendrik was a bond in favour of the partnership for the sum of 2000*l*. The bond is valued in the inventory at that sum. It was paid off in full after Hendrik's death.

Hendrik's representatives claimed to be entitled to three fourths, or 1500*l*., that is, one half representing Hendrik's share as partner, and one fourth under the will, leaving 500*l*. for the other heirs. The other heirs or their representatives contended

J. C.
1909
STEPHAN
v.
CAPE TOWN BOARD OF EXECUTORS.

that they were entitled to 750*l.* as representing three fourths of the testator's interest in that asset, and that Hendrik's representatives were entitled to 1250*l.* only, being Hendrik's half-share as partner, and one fourth of the testator's half-share under the will. A special case was settled, and it was agreed that it should be taken as a test case, as similar questions had arisen or were likely to arise.

The Supreme Court of the Colony decided in favour of the contention of the respondents. Hendrik's representatives appealed from that decision by special leave.

For the reasons already given their Lordships are of opinion that the decision of the Supreme Court is correct. They will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellants will bear the costs of the appeal.

Solicitors for appellants: *Capel Cure & Ball.*
Solicitors for respondents: *Boxall & Boxall.*

[PRIVY COUNCIL.]

JAMES LESLIE WILLIAMS . . . . . DEFENDANT;

AND

CURATOR OF INTESTATE ESTATES . . . PLAINTIFF.

J. C.*
1909
Feb. 15;
March 31.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Law of New South Wales—Public Service Act, 1895, *s.* 60, *sub-s.* 1; *s.* 67—*Civil Service Act*, 1884, *s.* 46—*Construction—Compensation on Retirement.*

Under the New South Wales Public Service Act, 1895, the plaintiff's services in the Bankruptcy Department as a member of the New South Wales Civil Service were dispensed with as from June 30, 1896, and he received under that Act a refund of his contributions to the Superannuation Account established by the Civil Service Act, 1884, and a gratuity as provided by s. 60, sub-s. 1, of the Act of 1895, and in addition a pension under the Public Service (Superannuation) Act, 1899.

In June, 1905, he sued for an increased pension on the ground that

* *Present:* LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and LORD GORELL.

J. C.
1909
WILLIAMS
v.
CURATOR OF INTESTATE ESTATES.

his services had been dispensed with in consequence of the abolition of his office and that he was entitled to the benefits in that case provided by the Act of 1884, s. 46:—

Held, that whether or not the plaintiff's retirement was "in consequence of the abolition of his office" within the meaning of that expression in the Act of 1884 it was incompetent for him to fall back upon that Act after having received the full compensation provided by s. 60 of the Act of 1895. All compensation other than that provided by the said Act was expressly excluded by s. 67 thereof. There was no grant or reservation to him of a right (if any) under the Act of 1884.

APPEAL by special leave from a judgment of the High Court (December 21, 1906) reversing a judgment of the Full Court of New South Wales and ordering that a verdict be entered for the plaintiff, Henry James Greville.

The plaintiff on February 10, 1905, sued in the Supreme Court of New South Wales to recover from the State of New South Wales arrears of pension claimed to be due to him under the Civil Service Act, 1884 (48 Vict. No. 24), from July 1, 1896, when he was retired from the public service under the Public Service Act, 1895 (59 Vict. No. 25). He was a person who came under the Act of 1884. Under the circumstances stated in their Lordships' judgment he received in 1896, under s. 60, sub-s. 1, of the Act of 1895, on his being retired 995*l.* 3*s.* 9*d.* as a gratuity and refund, and in addition a pension of 122*l.* 13*s.* under the Superannuation Act of 1899 (No. 55), s. 2, subsequently increased to 139*l.* 16*s.* In his action he claimed that his retirement was under s. 46 of the Act of 1884 and not under the Act of 1895, and that he was under the former Act entitled to a pension of 261*l.* 18*s.* 4*d.* instead of 139*l.* 16*s.* on the ground that his services had been dispensed with in consequence of the abolition of his office. Pring J. found that the evidence established beyond all doubt that plaintiff's services were dispensed with under s. 8 of the Public Service Act of 1895 and not in consequence of the abolition of his office, and the Full Court dismissed a motion for a new trial which the plaintiff had made on the ground that his retirement was under s. 46 of the Act of 1884. The High Court reversed this decision, and under its judgment the plaintiff had to refund the gratuity of 995*l.* 3*s.* 9*d.* without interest and became entitled during the remainder of his life to an annuity of

261*l.* 18*s.* 4*d.* He died on July 22, 1907, and the respondent represents his estate.

J. C.
1909
WILLIAMS v. CURATOR OF INTESTATE ESTATES.

Sir R. Finlay, K.C., and *A. dBeckett Terrell*, for the appellant, contended that the plaintiff had received all that he was entitled to under the Acts of 1895 and 1899 and was not entitled to claim under the Act of 1884. His services had been dispensed with under s. 8 of the Act of 1895, and s. 60, sub-s. 1, of that Act determined his rights consequent thereon, and s. 2 of the Act of 1899 gave him his pension. Sect. 46 of the Act of 1884 ceased to apply to him after the Act of 1895, for he did not come within the class of persons defined in the proviso to s. 62 of the later Act, as he was removed from the service before the expiration of twelve months from the date of the Act. Moreover, his retirement did not result from the abolition of his office. He was precluded by s. 59 as a person within the meaning of that section and also by s. 67 from receiving any compensation other than that provided by that Act; and he must be held to have waived and abandoned his claim, if any, under the Act of 1884 by electing to take the benefits conferred upon him by the Acts of 1895 and 1899 and acquiescing therein for so long a period. Reference was made to *Walker* v. *Simpson*. (1)

The respondent did not appear.

1909
March 31.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order of the High Court of Australia, which reversed the decision of the Full Court of New South Wales and directed a verdict to be entered for the plaintiff in the action.

The plaintiff, Henry James Greville, was a member of the Civil Service of New South Wales. His services were dispensed with as from June 30, 1896, by the Public Service Board, established under the Public Service Act, 1895. At the date of his retirement he was fifty-eight years of age and had forty-one years of service to his credit. On retirement he received such benefits as he appeared to be entitled to under the Act of 1895,

(1) [1902] A. C. 208.

J. C. 1909 WILLIAMS v. CURATOR OF INTESTATE ESTATES.

in the shape of a refund of his contributions to the Superannuation Account, established by the Public Service Act, 1884, and a gratuity as provided by s. 60, sub-s. 1, of the Act of 1895. On the passing of the Public Service (Superannuation) Act, 1899, he received in addition a pension, calculated in accordance with the provisions of that Act. In June, 1905, he brought this action against the Government claiming an increased pension on the ground that his services had in fact been dispensed with in consequence of the abolition of his office, and that consequently he was entitled to the benefits in that case provided by the Act of 1884. He failed in the Courts in New South Wales, but succeeded in the High Court. Special leave to appeal against the order of the High Court was applied for and granted. The amount in dispute was not large, but it appeared that other cases depended on the result of the action, and the order of the High Court seriously affected the construction of the Act of 1895. Shortly after leave was granted the plaintiff died, and the appeal has been revived against the Curator of Intestate Estates as the plaintiff's legal personal representative. The case was heard ex parte, although the order granting leave to appeal provided for the respondent's costs in any event.

The judgments of the learned judges of the High Court seem to turn almost entirely on the question whether the plaintiff's retirement was or was not "in consequence of the abolition of his office" within the meaning of that expression in the Act of 1884. That, no doubt, is a question of some difficulty. Their Lordships are disposed to think that the judgment of the High Court is right on the point, assuming the point to be open. But, with the utmost respect, it appears to their Lordships that that was not the real question. There is the preliminary question which, in the argument before the High Court, does not seem to have received so much attention as, in their Lordships' opinion, it deserves. The question is, Was it competent for the plaintiff, having regard to the express provisions of the Act of 1895, to fall back on the Act of 1884?

In the opinion of their Lordships the question at issue between the parties must depend on the provisions of the Act of 1895 and

the action of the Public Service Board. But it will be convenient, in the first place, to refer briefly to the Act of 1884 and to explain the position of the members of the Civil Service at the time of the passing of the Act of 1895.

Now the Act of 1884 seems to have been the first attempt in the Colony to regulate the Civil Service by statute and to provide pensions and gratuities on a large and liberal scale for civil servants on retirement. The Act, which came into operation on January 1, 1885, recites in the preamble that "it is expedient that officers of the Civil Service should be classified and that a scale of salaries and a system of appointments, promotions, and retiring allowances should be established and that other provisions for the regulation of the service should be made," and then, after an interpretation clause, which throws no light on the question under consideration in the High Court, comes the body of the Act. It is divided into six parts. Part I., headed "Classification," contains the following clause, which was much discussed in the argument in connection with the meaning of the expression "abolition of office": "10. If the services of any officer shall be dispensed with in consequence of the abolition of his office or any departmental change, and not from any fault on his part, such officer may be required at the rate of salary last received by him to perform any duty for which he is considered competent in any public department, and, should he refuse such change of duty, he shall not be entitled to receive any compensation."

Then the Act provides for the appointment of a Civil Service Board to carry out the purposes mentioned in the preamble.

Part V. contains clauses numbered 42—52. Clause 43 allows officers to retire at the age of sixty. Clause 44 allows retirement under that age in case of ill-health. Clause 46 is in these terms: "46. When the services of any officer are dispensed with in consequence of the abolition of his office and no other office can be offered to him at the same salary as hereinbefore provided" [referring evidently to clause 10] "or at a salary not less than five-sixths of the same, he shall be entitled to retire upon the superannuation allowance hereinafter provided."

Clause 48 lays down the scale of superannuation allowances.

Part VI., headed "Civil Service Superannuation Account,

J. C. 1909 — WILLIAMS v. CURATOR OF INTESTATE ESTATES.

Miscellaneous," provides for setting up an account called "the Civil Service Superannuation Account." It was to be maintained by a grant from the Consolidated Revenue Fund and the transfer of a grant from that fund limited to 3500*l.* per annum, under the Imperial Act 18 & 19 Vict. c. 54, subject to existing and future claims thereon, and also by a levy of 4 per cent. per annum on the salaries of all members of the Civil Service to whom the Act applied.

The Act of 1895, passed on December 23, 1895, was more drastic in its operation. It repealed the whole of the Act of 1884 except clauses 1 and 2 (short title and interpretation) and except Part V. and the provisions in Part VI. relating to the Civil Service Superannuation Account. It established a Board called "the Public Service Board," and conferred on that Board far larger powers than those enjoyed by the Civil Service Board. It provided (s. 7) that the permanent head of each ministerial department of the public service should furnish the Board with a return shewing the number of officers in his department, their respective salaries, emoluments, and duties, and other particulars specified in the section, including the date of each officer's appointment and the length of his service. Sect. 8 required the Board to inspect every department and investigate the character of the work performed by every officer therein, and the efficiency, economy, and general working of such department both separately and in its relation to other departments. Then the section goes on to declare that "If the Board shall at any time find that a greater number of persons is employed in any department than it may determine to be necessary for the efficient working thereof, such persons as are in excess may, if practicable, be transferred to any other department which in the opinion of the Board requires additional assistance, and if the persons so found to be in excess cannot be usefully and profitably employed in any other department, their services shall be dispensed with subject to the provisions of section 60 hereof."

Sect. 60, so far as material, is in the following words:—

"60. If the services of any person permanently employed in the public service shall be dispensed with by the Board . . . . otherwise than for an offence, then—

"(1.) If such person shall have been employed in the public service before and at the date of the commencement of this Act and shall be a contributor to the Superannuation Account under the provisions of the Civil Service Act of 1884, but shall not be entitled to retire under sections 43 and 44 of that Act, such person shall receive a refund of the amount of his contributions to such account calculated to the date on which his services shall have been dispensed with, together with a gratuity not exeeding one month's pay for each year of service from the date of his permanent appointment and a fortnight's pay in respect of each year of temporary service, such gratuity to be calculated on the average of his salary during the whole term of his employment and to be payable only in respect to service prior to the commencement of this Act."

The only other material section in the Act of 1895 is s. 67, which is in the following terms:—

"67. Except as in this Act provided no officer in the public service shall be deemed to be entitled to any compensation by reason of any reduction of his salary or in consequence of his services being dispensed with."

At the trial the chairman of the Public Service Board deposed that in 1896 the Board went through the Bankruptcy Department. "We dealt with it," he said, "and graded it. It appeared that a greater number of persons were employed than was necessary. Plaintiff was one of the number in excess, and could not be usefully and profitably employed in any other department. His services were then dispensed with by the Board."

In the New South Wales Government Special Gazette of July 4, 1896, a notice appeared stating that his Excellency the Governor, with the advice of the Executive Council and upon the recommendation of the Public Service Board, had approved of the retirement of the under-mentioned officers from the public service under the provisions of the Public Service Act of 1895 as from the 30th ultimo. Then follows a list of names; among them appears "Mr. Henry James Greville, Accountant and Cashier, Bankruptcy Office." Sect. 70 of the Act of 1895 enacts that all notices of retirements and removals of officers under the Act shall be published in the Special Gazette, and that "every such

J. C. 1909

WILLIAMS v. CURATOR OF INTESTATE ESTATES.

notice shall be deemed and taken to be conclusive evidence of every such . . . . retirement or removal."

As already stated, the plaintiff on his retirement received a refund and gratuity in accordance with the provisions of s. 60. His services were dispensed with under the Public Service Act, 1895. The Public Service Board had no power to deal with his case under any other Act. He received the compensation provided by s. 60. Sect. 67 excluded him from any other compensation.

It is quite true that the office of Accountant and Cashier in Bankruptcy was not filled up on the plaintiff's retirement by the appointment of a successor with the same title. The duties were performed by a gentleman who was graded as "clerk" and continued to be officially described by that designation. Assuming, however, that the change of designation amounted in the case of the plaintiff to the "abolition of his office" within the meaning of s. 46 of the Act of 1884, their Lordships are unable to understand upon what grounds the plaintiff could claim the right to resort to that Act when no such right was reserved or granted to him by the Act of 1895. Sects. 43 and 44 of the Act of 1884 do not depend on any action by the Civil Service Board. But s. 46 could only come into operation on the abolition of an office by, or at the instance of, the Civil Service Board, which is now defunct, or under the provisions of s. 62 of the Act of 1895 in the case of an officer continued by the Public Service Board in the service after the passing of the Act for twelve months and then removed without any fault on his part. Then it is made applicable, though otherwise it would not apply.

Their Lordships will therefore humbly advise His Majesty that the order of the High Court should be reversed, but without costs, and that the order of the Full Court of New South Wales and the judgment of Pring J., dismissing the plaintiff's action, should be restored.

There will be no costs of this appeal.

Solicitors for appellant: *Light & Fulton.*

[PRIVY COUNCIL.]

J. C.*
1909
March 5, 16
31.

BLUE & DESCHAMPS . . . . . PLAINTIFFS;

AND

RED MOUNTAIN RAILWAY COMPANY . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Railway Act, 1888, *s.* 134—*Railway Act*, 1903, *ss.* 128, 239—*Admissibility of Railway Map by the Appellate Court—Damages by Fire—Ignition of Combustible Matter on Railways—Right of Way—Negligence.*

By s. 239 of the Railway Act, 1903 (3 Edw. 7, c. 58), it is provided that the respondent railway company shall at all times keep its right of way free from combustible matter, sub-s. 2 providing that when damage is caused by a fire started by a railway locomotive the company shall be liable whether guilty of negligence or not, in the latter case the liability being limited to a specified amount.

Where ignition occurred from the respondents' engine sparks at a rocky bluff shewn by a map filed by them in the Department of Railways and Canals under s. 134 of the Railway Act of 1888, repeated by s. 128 of the later Act, to be within the delineated right of way, the respondents were held to be liable for the damages assessed by the jury.

The Supreme Court of Canada, having on the objection of the respondents refused to admit the map in evidence on the ground that it had not been tendered at the trial, ordered a new trial:—

Held, that whether or not the Supreme Court was right in refusing to admit the map their Lordships would admit it, that it was conclusive in favour of the appellants, and that there had been no misdirection.

APPEAL by special leave from a judgment of the Supreme Court (November 20, 1907) reversing a judgment of the Supreme Court of British Columbia (January 21, 1907) and ordering a new trial on the ground of misdirection.

The action was for damages for the respondents' negligence in that the fire which in August, 1905, destroyed the appellants' premises was started by a spark from an engine of the respondents on their right of way, and that this right of way had not been maintained and kept free from combustible matter in accordance with the Railway Act of Canada. The jury found for the appellants. The Supreme Court of British Columbia refused a

* *Present:* LORD ATKINSON, LORD COLLINS, LORD SHAW, and SIR ARTHUR WILSON.

J. C. 1909 — BLUE & DESCHAMPS v. RED MOUNTAIN RAILWAY.

new trial, Hunter C.J. holding that there was evidence before the jury upon which they might reasonably come to the conclusion that the fire originated within the respondents' right of way; Martin J. dissenting on the ground that the judge had misdirected the jury in telling them that they must decide the question whether the fire had jumped certain intervening unburnt ground and come over to the plaintiffs' premises, first upon their inspection of the ground, and then, if they could not decide upon that, by calling to their assistance the oral evidence.

The respondents appealed to the Supreme Court of Canada, the appellants having since the hearing in the Supreme Court of British Columbia searched for and found the map or plan mentioned in their Lordships' judgment of the completed railway of the respondents which had been filed by them on March 15, 1897, under s. 134 of the Railway Act, 1888. The Supreme Court refused to admit it, relying on ss. 51 and 73 of the Supreme Court Act (R.S.C., 1906, c. 139), but they ordered a new trial on the ground of misdirection, holding that the charge could have left no doubt on the minds of the jury that if in exercising their statutory power under s. 118 (i.) the respondents had left material which became ignited by sparks from their locomotive, their having done so would be evidence of actionable negligence, which was not the case made out by the pleadings.

Sir R. Finlay, K.C., and *C. R. Hamilton, K.C.*, for the appellants, contended that the plan deposited under s. 134 ought to have been admitted in evidence by the Supreme Court. The sections relied upon did not prohibit the admission, and the plan was conclusive as to the rocky bluff being on the right of way. There was no misdirection, and the jury by their finding as to the right of way shewed that they had been directed to the case made out by the pleadings. They referred to the Railway Act, 1888 (51 Vict. c. 29), ss. 90, 103, and 134, and the Railway Act, 1903 (3 Edw. 7, c. 58), ss. 118 (i.), 138, 139, and 239; and to 3 and 4 Will. 4, c. 41, s. 7, and Safford and Wheeler, Privy Council Practice, p. 33.

J. A. Simon, K.C., and *Bremner*, for the respondents, contended that the Supreme Court were right in not admitting the

plan. There was misdirection, as the judge told the jury that they were at liberty to disregard the evidence and determine for themselves, after viewing the place, whether the fire which caused the damage complained of was the fire which started from the railway. The judge failed to point out to the jury that the statutory obligation to keep the right of way free from combustible material did not apply to the adjoining land, upon which the respondents were under s. 118 (i.) of the Act of 1903 entitled to enter and fell trees. He practically told the jury to find that the rocky bluff was within the right of way, and did not define right of way or point out what evidence would entitle them to find that the rocky bluff was situated thereon. Sect. 239 of the Act of 1903 on its true construction did not apply to the rocky bluff. Upon the point as to the jury being told to act on their own knowledge and eyesight, see *London General Omnibus Co., Ld.* v. *Lavell* (1); *Jose* v. *Metallic Company of Canada.* (2)

1909
March 31.

The judgment of their Lordships was delivered by

LORD SHAW. The plaintiffs (appellants) are sawmill owners and timber merchants who own certain property in the neighbourhood of Rossland in the province of British Columbia. The defendants, the Red Mountain Railway Company, own and work a line of railway running northwards to Rossland from the boundary line of British Columbia and the United States of America.

On August 24 and 25, 1905, certain property of the plaintiffs was destroyed by fire. The allegation is that this fire originated on the 23rd upon the property of the railway company and by reason of their negligence. The fire swept in a northerly direction; the damage caused to the plaintiffs' property has been assessed by a jury at $18,000.

In the plaintiffs' statement of claim it is averred that the defendants "started a fire on their right of way"; that the right of way was not kept "free from dead or dry grass, weeds, or other unnecessary combustible matter"; and that the fire "was started through the negligence of the company." These allegations the company deny. Both parties refer to the

(1) [1901] 1 Ch. 135. (2) [1908] A. C. 514.

J. C. 1909

BLUE & DESCHAMPS v. RED MOUNTAIN RAILWAY.

provisions of the Railway Act, 1888 (51 Vict. c. 29), and the Railway Act, 1903 (3 Edw. 7, c. 58). By s. 239 of the latter statute it is provided that "the company shall at all times maintain and keep its right of way free from dead or dry grass, weeds, and other unnecessary combustible matter." By sub-s. 2 it is provided that, when damage is caused by a fire started by a railway locomotive, the company, whether guilty of negligence or not, shall be liable, a proviso being added that the liability shall be limited to $5000 if no negligence be proved. It is plain that, if the company did not maintain and keep its right of way free from combustible matter, they directly contravened the substantive provision of the statute. This negligence the jury has affirmed.

But the railway company throughout the proceedings in Canada strongly maintained that the point where the fire originated was not upon its right of way; and any difficulties which arise in the case spring from this contention. The ignition from engine sparks occurred at a rocky bluff on the north side of the track. Whether that rocky bluff was on the railway company's right of way is a point which, upon the pleadings, the railway company deny, and of which, in evidence, their witnesses professed ignorance. The awkwardness and possible injustice arising from doubt in such a state of matters are manifest, and this is well illustrated in the course of the present action. But so far as the Legislature of Canada is concerned every precaution had been taken by statute to prevent these. In both of the Railway Acts of 1888 and 1903, already cited, careful provision had been made not only for a clear delineation on plan of the location, width, and extent of the line, but by s. 134 of the former Act, which is substantially repeated by s. 128 of the latter, a "plan and profile of the completed railway and of the land taken or obtained for the use thereof" is to be made and filed with the Board; (2.) plans, &c., of the parts located in different districts and counties are to be filed in the registry offices for those districts and counties; and (3.) any railway company which fails in the duty of making and filing as above is liable to a statutory penalty of $200 per month. In face of these clear provisions the plaintiffs, in

preparing the case for trial, very naturally administered the following interrogatory to the defendants: "What width is your right of way between said trestle and the section house as shewn on your plans filed under the provisions of the Railway Act?" To this question, founded upon the statute, the following answer is given by the secretary of the company: "No plans of the completed line of railway of the defendants have been filed under the provisions of the Railway Act." One need not go through these protracted judicial proceedings in detail; but from them two things are abundantly clear—(1.) that the railway company continued to assert as matter of fact that the plans, which it was their duty under the Acts of Parliament to make and file, had not been so made, or at least so filed, and were not available and could not be produced; and (2.) that they have raised many objections and interposed many obstacles in the way of the plaintiffs otherwise establishing—by the evidence of those who laid out the railway and of acts of possession, including the slashing of timber, &c., since then—that the right of way did embrace the rocky bluff.

After viewing the ground and hearing the evidence the jury had the specific question put to them, "Is the rocky bluff mentioned in the evidence within the right of way of the defendants?" and to this the jury answered "Yes," finding for the plaintiffs and assessing the damages as before mentioned.

An appeal on the ground of misdirection was made by the defendants to the Full Court of the Supreme Court of British Columbia, and that Court, one of the learned judges dissenting, dismissed the appeal. An appeal was then taken to the Supreme Court of Canada, and on November 20, 1907, that Court gave judgment allowing the appeal and ordering a new trial. From that judgment the appeal to the Privy Council, special leave having been given, is now made.

Before the hearing in the Supreme Court of Canada was reached this circumstance had occurred, namely, that the plan which according to the contention maintained throughout by the railway company had either never been made, or at least never been filed, had been actually discovered and was in fact available. It was tendered by the plaintiffs to the Supreme

J. C
1909
BLUE & DESCHAMPS v. RED MOUNTAIN RAILWAY.

Court of Canada; and it is plain that it not only was equivalent to the writ of the railway company, but that by the law of Canada it was a document to be filed with the Board and in the registry of the district through which the railway passed, and that, in short, its availability for public reference was part of the policy of the Legislature. The defendants objected to the production of the plan; and the Supreme Court of Canada felt itself precluded from admitting it to evidence, the learned Chief Justice, Sir Charles Fitzpatrick, expressing hesitation upon the point and his regret that it was not possible to entertain the application of the plaintiffs.

It is not necessary to decide whether the Supreme Court of Canada was precluded by law from admitting this document, and the point was not fully argued before their Lordships. But it is at least clear that the Judicial Committee of the Privy Council is not so precluded, but, on the contrary, has power to admit and look at the document. This was conceded by both sides. The plan is docqueted as follows:—

"Map of Constructed Line.
"Red Mountain Rly.
"Scale: 1 inch = 400 feet.
"E. J. Roberts, Chief Engineer.

"Plan of completed railway filed in the Department of Railways and Canals this 15th March, 1897, under section 134 of the Railway Act of 1888.

"Collingwood Schreiber,
"Deputy of the Minister of Railways and Canals.
"Ottawa, 15th March, 1897."

There is no substantial dispute as to what it discloses. Put in a word, the railway company's own plan shews that the rocky bluff where the fire originated was within the delineated right of way. What the jury had arrived at after a troublesome and involved investigation is proved, so to speak, under the railway company's own hand to have been right, and the arguments on that head submitted by the defendants, both before and after the plan was discovered, to have been wrong.

It is not necessary to examine in detail the judgment delivered

by Duff J. in the Supreme Court of Canada. It proceeds upon the footing that the plan was not available. Having now been produced, it demonstrably contradicts the result arrived at, namely, that the plaintiffs had failed to establish that the fire had originated upon the defendants' right of way; and this is an end of that portion of the case.

What remains is an argument, which was carefully presented to their Lordships, to the effect that Morrison J., the learned judge who presided at the trial, misdirected or failed sufficiently or properly to direct the jury. This point does not appear to have been raised in the Supreme Court of Canada, and that Court does not deal with it. In their Lordships' opinion there was no misdirection, and they cannot agree with the opinion of Martin J., who dissented from the decision of the Full Court of British Columbia. It is not contended that the verdict is against the weight of evidence. All that is said is that by a certain sentence in the charge of Morrison J. the jury were substantially directed to exclude all oral evidence from their minds. In dealing with the physical possibility of the fire leaping over from one point of ground of considerable altitude to the south of the plaintiffs' buildings and reaching at a distance of 600 yards or so the lower altitude where these buildings were situated the learned judge properly gave much prominence to the view which had been obtained by the jury of the locality, and he said, "Whether the fire which burned all these limits was a continuation of that fire which started down there so small and innocently at the Red Mountain track, it is for you to say whether you can determine that for yourselves, regardless of what was said for or against." Were that sentence to stand by itself, some colour might be given to the contention put forward, but in the very next sentence the learned judge adds: "If you cannot decide from your own inspection, then you must call to your assistance the oral testimony, the evidence of those whom you have heard. Do you believe from what you saw and what you have heard that it was the same fire that started from the railway that destroyed Blue & Deschamps' timber?"

Taking these sentences in immediate context together, it seems impossible to maintain that there was the misdirection suggested,

J. C. 1909

BLUE & DESCHAMPS v. RED MOUNTAIN RAILWAY.

and their Lordships do not think it legitimate, in considering a judge's charge to a jury, to separate a single sentence in the manner suggested, unless such a sentence in fact dominated the reasoning upon which that portion of the charge was founded. Misdirection, to be a ground of new trial, must be substantial misdirection.

It is unnecessary to consider the further point put before their Lordships, namely, that there had been certain evidence that the fire at the St. Louis buildings must have started in point of time before the fire which originated upon the railway could have reached near that spot. In their Lordships' opinion (1.) the learned judge, in the latter portion of his charge, put the direct origination of the fire plainly before the jury, and upon that obtained an answer, and (2.), in so putting the point, their Lordships do not think it was necessary for him to explain to the jury that they had heard evidence from certain witnesses suggesting that the fire on the plaintiffs' premises could not have been caused by the fire from the right of way, because its outbreak had preceded the time when the railway fire reached the vicinity of the St. Louis buildings. Their Lordships do not think that it was the judge's duty to assume that a jury, considering the cause of a fire at the St. Louis buildings, might fall into the fundamental error that this fire, as an effect, preceded instead of succeeded the originating cause, namely, the right of way fire. In their Lordships' opinion the effect of the reference by the judge to the jury's view of the locus has been much exaggerated, and the jury were properly left to put together all that they had seen and heard.

Their Lordships will therefore humbly advise His Majesty that the judgment of the Supreme Court of Canada should be reversed with costs and the judgment of the Full Court of British Columbia restored.

The respondents must pay the costs of this appeal.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Norton, Rose, Barrington & Co.*

[PRIVY COUNCIL.]

CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA . . . . . } PLAINTIFFS;

AND

BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED . . . . . } DEFENDANTS.

J. C.*
1909
Feb. 2, 3;
March 31.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF PENANG).

Bills of Lading—Cesser of Liability Clause—Construction—Delivery of Goods overside to Landing Agents.

Goods were shipped on board the defendants' ship to be carried to Penang and delivered there to order or assigns under bills of lading which contained the condition that "in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." They were delivered to landing agents appointed by the defendants, and for that purpose had been discharged from the ship's tackle into lighters sent by the said agents, but by fraud, in which the said landing agents participated, never reached the consignees:—

Held, that although there had been no delivery under the bills of lading, yet the provision as to cesser of the defendants' liability directly the goods were "free of the ship's tackle" was perfectly clear, and that it must be held to be operative and effectual to protect them.

APPEAL from a judgment of the Supreme Court (September 24, 1907) affirming a judgment of Thornton J. (January 24, 1907) which dismissed the appellants' action.

The action was brought by the appellants as holders of two bills of lading (August 1 and 2, 1905) of certain goods shipped on board the respondents' steamship *Teesta* at Cuddalore and Pondicherry for Penang and was for damages for non-delivery or conversion of the said goods. Alternatively they sued as assignees of the rights of the shippers.

It was agreed at the trial that only the question of liability should be tried and that the question of damages should be

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

J. C.
1909
CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA v. BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

reserved. The clause in the bills of lading material to the issue decided is set out in their Lordships' judgment.

The judgment of the majority of the Supreme Court affirmed the dismissal of the action. The Chief Justice was of opinion that though the respondents' obligation to deliver was not discharged until delivery to the consignees, yet they had on the true construction of the said clause contracted themselves out of liability as soon as the goods were free of the ship's tackle.

Fisher J., who dissented from this judgment, held that the respondents' liability as carriers continued after the goods were landed and stored, in view of the fact that the respondents retained their lien, and in view of the further fact that the appellants could not, except in very exceptional circumstances, get delivery of their goods by mere production of the bill of lading, but were obliged for that purpose to obtain the indorsement thereon of a delivery order by the agents of the respondents.

Hamilton, K.C., and *Tyrrell Paine*, for the appellants, contended that the goods in suit which had been shipped under the bills of lading had never been delivered to them as indorsees thereof, and that the respondents' liability had not been discharged. According to a custom which has been established at the port of Penang, goods on their arrival are discharged into lighters of certain firms who act as landing agents, and who receive the goods and distribute them amongst the consignees. The goods in this case were received by one P. Bob, a landing agent, and stored in his shed, and while there had been fraudulently delivered by his servant to the acceptors of certain dishonoured bills of exchange which had been drawn against the bills of lading and discounted by the appellants. The question to be decided was whether the respondents were liable, the goods never having been delivered to the consignees, or whether they were excused by the cesser of liability clause in the bills of lading. It was contended that the landing agent who had been in the habit of receiving goods from the respondents' steamships was their agent, and not a servant of the appellants. Until the bills of

lading had been indorsed by the agents of the respondents with a delivery order the consignees could not get them, and the goods remained with the respondents and were in their hands subject to their shipowners' lien. The custom of the port of Penang was not to the effect that discharge from the ship to the landing agent amounted to delivery to the consignees. It was clear that there had been no delivery as contemplated by the bills of lading, and it was contended that the majority of the Supreme Court had put too wide and general interpretation upon the cesser of liability clause. Read in connection with the other clauses of the bills of lading it was ambiguous and inconsistent with their main provisions and did not avail to protect or excuse the respondents. Reference was made to *Steinman & Co.* v. *Angier Line* (1) ; *Elderslie Steamship Co.* v. *Borthwick* (2) ; *Nelson Line (Liverpool), Ld.* v. *James Nelson & Sons, Ld.* (3)

Scrutton, K.C., and *Maurice Hill*, for the respondents, contended that according to the custom of the port and the terms of the bills of lading delivery of the goods overside to the landing agent was a complete fulfilment of the respondents' obligation as carriers, and the respondents were not afterwards under any liability with regard to them. The landing agent must be held to be the agent not of the respondents, but of the consignees, and in any event the respondents were not liable for the criminal misappropriation of the goods by the servant of the landing agent, who, moreover, was then acting as warehouseman. But whether there had been completed delivery of the goods or not, it was contended that the cesser of liability clause was clear and unambiguous and that full effect should be given to it as to an essential provision of the contract. After delivery overside, whether or not anything remained to be done to complete it, the liability of the carriers was at an end, and the goods were by express terms of the contract at the risk of the consignees. The shipowner has nothing further to do with them except to forbid delivery until his freight is paid. The condition assented to by the parties was just and reasonable and ought to be enforced. Reference was made to *Petrocochino* v. *Bott* (4) ; *Baxter's Leather*

(1) [1891] 1 Q. B. 619, 623.
(2) [1905] A. C. 93.
(3) [1908] A. C. 16.
(4) (1874) L. R. 9 C. P. 355.

J. C.
1909
CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA v. BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

Co. v. *Royal Mail Steam Packet Co.* (1); to a series of cases before 1860 as summarized by Blackburn J. in *Peek* v. *Directors, &c. of North Staffordshire Ry. Co.* (2); *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown* (3); *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (4); *Wilton* v. *Royal Atlantic Mail Steam Navigation Co.* (5); *Taubman* v. *Pacific Steam Navigation Co.* (6); *Thompson* v. *Royal Mail Steam Packet Co.* (7); *Allan Brothers* v. *James Brothers* (8); *Wade* v. *Cockerline* (9); *Chapman* v. *Great Western Ry. Co.* (10)

Hamilton, K.C., in reply.

1909
March 31.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The appellants, the Chartered Bank of India, Australia, and China, were holders for value of bills of exchange drawn against bills of lading under which goods were to be carried to Penang and delivered there to order or assigns. The carrying vessel was the steamship *Teesta*, one of a line of steamers belonging to the respondent company. The bills of exchange, which were drawn upon S. Fareeth & Co., of Penang, had been discounted by the bank, and the bills of lading indorsed in blank were held by the bank as security for their advance.

The *Teesta* arrived at Penang on August 10, 1905. On her arrival the cargo intended for Penang was delivered overside into lighters and taken to the wharf.

It is the practice for the owners of steamers calling at Penang to appoint landing agents at that port. The business of the landing agents is to send lighters to meet an incoming vessel belonging to their employers on being furnished with a copy of the ship's manifest. The goods are discharged from the ship's tackle into the lighters. The landing agents give the master a clean receipt, if they are received in good order. The goods are then carried to jetty sheds, held under lease from Government, landed there, and assorted by the landing agents ready for

(1) [1908] 2 K. B. 626.
(2) (1863) 10 H. L. 472, 492.
(3) (1883) 8 App. Cas. 703.
(4) (1865) 3 Moo. P. C. (N.S.) 272.
(5) (1861) 30 L. J. (C.P.) 369.
(6) (1872) 1 Asp. (M.L.C.) 336.
(7) (1875) 5 Asp. (M.L.C.) 190, n.
(8) (1897) 3 Com. Cas. 10.
(9) (1905) 10 Com. Cas. 115.
(10) (1880) 5 Q. B. D. 278.

delivery to the consignees on production of the bill of lading indorsed by the ship's agents with a delivery order. If the consignees apply for their goods within ninety-six hours they get them free of store rent; if not, the goods are either kept in the jetty sheds or removed to godowns. The landing agents make out their account of the landing charges and storage rent, if any, according to a scale of charges exhibited in the offices of the ship's agents. They receive payment direct from the consignees. The indorsement of the bill of lading by the ship's agents is required as a release of the ship's lien for freight and expenses incurred on the shipment. Without such indorsement the landing agents are not at liberty to deliver goods to consignees.

This practice, which is obviously for the convenience of all parties concerned, appears to be at present the subject of much controversy in Penang. The shipowners contend that the landing agents are the agents of the merchants. The merchants insist that they are not their agents, but the agents of the shipowners. Neither view perhaps is quite accurate. These landing agents rather seem to be in the position of intermediaries owing duties to both parties—agents for the shipowners as long as the contract of affreightment remains unexhausted, agents for the consignees as soon as the bill of lading is produced with delivery order indorsed. The point, however, is not material for the determination of the question now at issue, and their Lordships therefore do not propose to discuss it further, or to define the exact position of landing agents at the different stages of their employment.

The bills of exchange in the hands of the bank were duly accepted by S. Fareeth & Co. on the arrival of the *Teesta*. On presentation for payment they were dishonoured. Application was then made to P. Bob & Co., the landing agents of the respondent company. The appellants produced the bills of lading, with delivery order indorsed, and claimed the goods. The goods were not forthcoming. They had been taken away without the production of a bill of lading or a delivery order by the representative of S. Fareeth & Co., acting in collusion with the representative of P. Bob & Co., and they had been already disposed of, in fraud of the persons entitled. Having thus lost

J. C.
1909
CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA v. BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

both their money and the goods which had been pledged to them as security, the bank preferred their claim against the respondents. The claim resulted in the present action. This appeal has been brought from the order of the Supreme Court, affirming the judgment of the Court of first instance, which dismissed the action with costs.

Both here and in the Courts below the respondent company disclaimed all liability, relying on conditions subject to which the bills of lading were expressed to be issued. They are printed at the foot of the bill of lading, and attention is called to them in the body of the bill. The only conditions material in the present case are those intended to be applicable on the arrival of the carrying vessel at the port of destination. They are contained in the following clause: "The company is to have the option of delivering these goods or any part thereof into receiving ship or landing them at the risk and expense of the shipper or consignee as per scale of charges to be seen at the agent's office, and is also to be at liberty until delivery to store the goods or any part thereof in receiving ship, godown, or upon any wharf, the usual charges therefor being payable by the shipper or consignee. The company shall have a lien on all or any part of the goods against expenses incurred on the whole or any part of the shipment. In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee."

On behalf of the respondents the contention was that the obligations they undertook were fulfilled by delivering the goods to the landing agents, and that at any rate their liability ceased when the goods were once "free of the ship's tackle."

On the other hand it was said on behalf of the bank that the landing agents were neither the assigns nor the agents of the shippers or consignees, and that the goods had never been delivered in accordance with the bills of lading. As regards the provision for cesser of liability, the suggestion was that it applied only to the interval between the removal of the goods from the ship and their being landed on the quay.

In addition to the arguments relied on in the Courts below, the learned counsel on behalf of the bank prayed in aid two recent decisions of the House of Lords (1) in which the House had occasion to reaffirm and apply the wholesome rule that if a shipowner wishes to relieve himself from liability to the shipper in case his vessel should be found to have been unseaworthy he must say so plainly. That is an old rule. It has never been questioned or doubted. But their Lordships do not recognize any very close analogy between a case where it is sought to get rid of a legal obligation, which is presumed to be the basis of every contract of carriage by sea, and a case like this, where the parties are perfectly free to make any stipulation they please, unembarrassed by any implied condition or any original underlying obligation.

In order to lay a foundation for their arguments the learned counsel for the appellants examined the bills of lading and the conditions attached to them, casting about everywhere for some contradiction or some ambiguity. They put cases suggested as occurring at other stages of the voyage in which the clause providing for cesser of liability could not apply. They found fault with the position of the provision in the particular clause where it occurs. They even took exception to its language. Liability was to cease when a certain thing was done; it was to cease "thereupon"; the word, they said, would have been "thereafter," not "thereupon," if the immunity stipulated for had been meant to be lasting. So minute and searching was the criticism. Now it may be conceded that the goods in question were not delivered according to the exigency of the bills of lading by being placed in the hands of the landing agents, and it may be admitted that bills of lading cannot be said to be spent or exhausted until the goods covered by them are placed under the absolute dominion and control of the consignees. But their Lordships cannot think that there is any ambiguity in the clause providing for cesser of liability. It seems to be perfectly clear. There is no reason why it should not be held operative and effectual in the present case. They agree with the learned

(1) *Elderslie Steamship Co., Ld.* v. *Borthwick*, [1905] A. C. 93; *Nelson Line (Liverpool), Ld.* v. *James Nelson & Sons, Ld.*, [1908] A. C. 16.

J. C. 1909

CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA v. BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED.

Chief Justice that it affords complete protection to the respondent company.

Their Lordships therefore will humbly advise His Majesty that the appeal should be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Linklater, Addison & Brown.*
Solicitors for respondents: *Rawle, Johnstone & Co.*

[PRIVY COUNCIL.]

J. C.* 1908 *Dec.* 10, 11. 1909 *Feb.* 10.

RABOT AND ANOTHER . . . . . PLAINTIFFS;

AND

DE SILVA AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Ordinance No. 6 of 1847, s. 31—Marriage of Adulterers—Illegitimacy of Children procreated in Adultery.

Ceylon Ordinance No. 6 of 1847, s. 31, recognizes the marriage of adulterers, but denies legitimation to children procreated in adultery:—

Held, that a legacy by a Ceylon testator to his widow, who had previously lived with him as his mistress during the life of her first husband, is valid. So also is a legacy to her children born during the widow's former marriage where it is not shewn that they were the children of the testator.

APPEAL from a decree of the Supreme Court in review (March 18, 1907) affirming a decree of the same Court (January 25, 1905) which affirmed a decree of the District Court of Colombo (March 17, 1903) whereby the appellants' suit was dismissed.

The appellants are husband and wife, the latter being one of the heirs in intestacy of Vincent William Pereira, as the only child of a predeceased brother. They claimed to be entitled to one fifth of his estate as derived from her father, alleging that the dispositions thereof made by his will were unlawful and ineffectual.

* *Present:* LORD ROBERTSON, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

The first two respondents were the executors of his will dated November 14, 1899. The third respondent was Justina, who was the lawful wife of one Salman Appu from December 26, 1859, till his death on April 13, 1889. On July 13, 1889, she married the testator, having previously lived in adultery with him for several years.

The fourth, fifth, and sixth respondents were the children of Justina born whilst she was so living with the testator (the seventh respondent being husband of the sixth). The eighth and ninth respondents had been brought up by the testator as his adopted daughters, being children of a son of Justina by her husband Salman Appu, born before the adultery began.

By his will Vincent Pereira, after some specific bequests to Justina, gave all his real estate to trustees upon trusts for the benefit of Justina (whom he called his wife) and the fourth, fifth, and sixth respondents (whom he called his daughters) and their descendants, and his adopted daughters the eighth and ninth respondents.

On May 2, 1901, the appellants filed their plaint praying that the respondents be cited to shew cause why it should not be declared that the devise in the will of Vincent William Pereira of the undivided share in the lands and premises the subject of this appeal was null and void, and that the second appellant as such heir as aforesaid was entitled to the said share.

The plaint alleged that the fourth, fifth, and sixth respondents were the children of Vincent Pereira, born whilst he was living in adultery with their mother, Justina, and were therefore incapable of taking anything under his will, and also that, because he had lived in adultery with Justina, he could not, in accordance with the Roman-Dutch law in force in Ceylon, contract a legal marriage with her, and that she therefore was also incapable of taking any benefit, directly or indirectly, under the will.

The District Judge found that the third respondent had lived in adultery with the testator in the lifetime of her then husband, and that the fifth and sixth respondents but not the fourth were the issue of such adulterous intercourse, and that by reason thereof the fifth and sixth respondents could not take under the will except so much as was necessary for their maintenance.

J. C.
1909
RABOT
v.
DE SILVA.

He also held that the marriage between the testator and Justina was unlawful and void for the reason given in the plaint; that the gift to the fifth and sixth respondents was void because they were born to the testator by Justina whilst he was living in adultery with her; that Justina could take under the will because at the date of the will and of the testator's death (July 28, 1900) she was not living in adultery with him (her husband being then dead), but was merely his concubine; but he dismissed the suit, holding that the shares given by the will to the fifth and sixth respondents went to the other legatees by the jus accrescendi. The Supreme Court on appeal and afterwards in review affirmed this dismissal, but held that, in accordance with the case of *Sopi Nona* v. *Marsiyan* (1) and s. 112 of the Evidence Ordinance (No. 14 of 1895), the fifth and sixth respondents as well as the fourth must be held to be the children of Justina's husband Salman Appu and therefore capable of taking under the will in suit.

Sect. 112 is as follows: "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten, or that he was impotent."

The reason given on the appeal was that the appellants' evidence was insufficient to rebut the presumption of legitimacy arising in virtue of the section according to the construction placed thereon, namely, that to rebut the presumption not only non-access by husband to wife but impossibility of access within the respective times at which the children might have been begotten must be proved, and no such impossibility was proved in this case.

The Supreme Court also held that the marriage of Justina to the testator was valid, and that as his lawful wife she was entitled to take under his will notwithstanding the adulterous intercourse previously subsisting.

(1) (1903) 6 N. L. R. 379.

Sir R. Finlay, K.C., and *Barrington-Ward* (*Miller* with them), for the appellants, contended that the construction placed on s. 112 was wrong [*Cohen, K.C.* I shall not contend that it is necessary to prove absolute impossibility of access] and that the evidence proved that Salman Appu did not in fact have access to the respondent at the times mentioned in the judgment. Accordingly the fifth and sixth respondents were proved within the meaning of s. 112 to be the issue of the adulterous intercourse between Justina and the testator and as such disqualified from benefiting under his will. Reference was made to *Sopi Nona* v. *Marsiyan*. (1) They further contended that the marriage of Justina with the testator was null and void by reason of the previous adultery. The placaat of July 18, 1674, absolutely prohibits such marriages. It was contended that s. 31 of Ordinance No. 6 of 1847 had no application. Reference was made to Ordinance 15 of 1876. The invalidity of the marriage, however, is not the determining factor in regard to the validity of the gift in Justina's favour; for even if legally married she was incapacitated by Roman-Dutch law from taking under the will. See Kotze's Van Leeuwen, vol. i., bk. 3, c. 3, s. 10; Digest, 34, 9, 13, and Code 5, 5, 6; Ortolan's Institutes, vol. ii. pp. 95, 96, on Institutes, 1, 10, 11. The common law of Ceylon is the Roman-Dutch law. It is true that the Roman authorities do not include the wife as under the same disability as the children as Van Leeuwen does: Grotius, Opinions (Bruyn), p. 179; Van Der Linden's Institutes, bk. 1, c. 9, s. 4; *Karonchihamy* v. *Angohamy* (2), a judgment of the Full Bench which, however, was not followed in review: see Wessel's History of Roman-Dutch Law, ed. 1908, p. 448; Ceylon Ordinances, No. 1 of 1889, amended by No. 24 of 1901; Civil Procedure Code (No. 2 of 1889), s. 780.

Cohen, K.C., and *F. H. M. Corbet*, for the respondents, were not heard as to the question of the fifth and sixth respondents being the children of the testator, the non-access of the husband not having been established. With regard to the validity of Justina's marriage to the testator and of the bequest in her favour

(1) 6 N. L. R. 379.
(2) (1897) 2 N. L. R. 276, 279; (1904) 8 N. L. R. 1.

J. C. 1909 RABOT v. DE SILVA.

it was contended that the placaat was never promulgated or applied in Ceylon; and Ordinance No. 6 of 1847, s. 31 (substantially re-enacted by s. 22 of Ordinance No. 2 of 1895), recognizes marriage between adulterers as legal. Otherwise Justina would still be entitled to take under the will in view of the provisions of Ordinance No. 21 of 1844, s. 1, which abolished restrictions upon the free disposition of property by will. With respect to the placaat of 1674, relied upon by the appellants, the Proclamation of 1799 and the Ordinance 5 of 1836 maintained in force the laws subsisting under the ancient government of the United Provinces. But the whole body of Roman-Dutch law as it existed in Holland had never been introduced by the Dutch at any time during their administration: see *Karonchihamy* v. *Angohamy* (1); Marshall's Judgments, p. 396; Cleghorn's Minute from the Ceylon Almanac, 1855; and the Mortmain case and the Plumbago case in Grenier's Reports, 1873. Vanderstraaten's Reports, appendix, and Voet, lib. 23, tit. 2, s. 97, were referred to as shewing that special legislation was necessary to make the Political Ordinance of 1580 applicable to the West Indies in 1629 and to the East Indies in 1661. A statute enacted in Holland before the acquisition of a colony therefore did not on its acquisition become ipso facto the law of the colony. The placaat a fortiori did not apply to Ceylon. In no instance has it been applied or enforced by the Courts, and if introduced has been abrogated by disuse: see *Seaville* v. *Colley*. (2) Ordinances No. 6 of 1847, s. 31, No. 2 of 1895, s. 22, and No. 19 of 1907, s. 22, shewed that it was not in force or by implication repealed it. The marriage therefore was valid, and there is no prohibition against the parties to a valid marriage benefiting under each other's will. And see Ordinance No. 21 of 1844, s. 1,

Sir R. Finlay, K.C., replied.

1909 *Feb.* 10.

The judgment of their Lordships was delivered by

LORD ATKINSON, who stated that it had been prepared by the late Lord Robertson. In this appeal the appellants challenge the validity of bequests by one Vincent Pereira to his widow and to

(1) 8 N. L. R. 1. (2) (1891) 9 Juta, 39.

two of her daughters. The widow, Justina, had first been married to Salman Appu, who died in April, 1889, and in July of the same year, 1889, she was married to Vincent Pereira. Pereira executed the disputed will in November, 1899, and he died in 1900.

Justina had for some years lived as Pereira's mistress during the life of her first husband, and the two daughters, whose legacies are in dispute, were born during this period. The bequests are challenged on the ground that the daughters were the fruits of adulterous intercourse and that this invalidates the gifts. The question of fact has first to be considered; and it is clear that, while Justina lived in Pereira's house, the husband lived in the neighbourhood and was not disabled from visiting her, nor was she disabled from visiting him, and Justina, who was examined as a witness at the trial, swears to connection with her husband at the periods in question and asserts her inability to determine the paternity of the children.

The broader facts of the case make it impossible to declare the children to be proved to be the children of Pereira, and, in their Lordships' judgment, the decision of the Supreme Court of Ceylon, who reversed the trial judge, was clearly right. Accordingly the question of law does not arise as to the validity of the bequests to the two children, the fifth and sixth respondents.

The remaining question is of the validity of the bequests to the widow. In considering this question it is to be remembered that by the time the will was executed the first husband was dead, and Justina had been made an honest woman of, so far as marriage could do it.

The appellants indeed dispute the validity of the marriage owing to the previous adultery. Obviously, however, as the bequest is to Justina by name, the primary dispute is on the appellants' argument that, wife or no wife, Justina was disabled by her former adultery from taking under the will of her paramour. Not the less, the validity of the marriage is a topic of crucial importance in the discussion of the general doctrine invoked by the appellants. That general doctrine, which is strongly supported in Roman and Roman-Dutch text law, is

J. C. 1909 RABOT v. DE SILVA.

represented as opposing to adultery so strong a reprobation that, once adultery has been committed, there results to the guilty parties an incapacity ever to marry one another or to take testamentary gifts from one another.

The interesting discussion thus raised as to the doctrine of the Roman-Dutch law on the article of adultery must not distract attention from the immediate and practical question, what is the living law of Ceylon on the matter in hand? Does the existing law of Ceylon support the contention that past adultery affixes indelibly the disabilities asserted? To their Lordships it appears clear that the appellants are logically right in maintaining the invalidity of Justina's marriage, for no system of law has been put forward which permits a woman to marry her paramour and at the same time disables her from receiving a bequest. If there had been authoritative decisions on specific questions on this subject, the debate would be different. But that is not the case and the appeal of the appellants is made to doctrine and principle.

Now, that the existing marriage law of Ceylon does not adopt, but on the contrary repudiates, the doctrine and principle invoked, is in their Lordships' opinion demonstrated by Ordinance No. 6 of 1847, which recognizes the marriage of adulterers as valid. Sect. 31 provides: "And it is further enacted, that from and after the notification in the Gazette of the confirmation of this Ordinance by Her Majesty, a legal marriage between any parties shall have the effect of rendering legitimate the birth of any children who may have been procreated between the same parties before marriage, unless such children shall have been procreated in adultery."

The case here contemplated is that of the marriage of adulterers; and, on very intelligible grounds, children procreated in adultery are expressly denied legitimation. The necessary contemplation of the Ordinance is that adulterers may lawfully marry, and the fact that this is assumed, and not enacted, gives to the Ordinance authority as an exposition of the law.

A modern and specific authority, such as this, dispenses from historical inquiry about Roman-Dutch law generally, and dislodges the Roman-Dutch law about the effects of adultery from the governing authority claimed for it by the appellants. That

being so, the respondents are entitled to prevail, and their Lordships will humbly advise His Majesty accordingly.

The appellants will pay the costs of the appeal.

J. C.
1909
RABOT
v.
DE SILVA.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Cayley & Cayley.*

[HOUSE OF LORDS.]

THE UNITED COLLIERIES, LIMITED . . APPELLANTS;
AND
ISABELLA SIMPSON (OR HENDRY) . . . RESPONDENT.

H. L. (SC.)
1909
June 24.

Employer and Workman—Compensation—Death of Dependant before making Claim—Right of Representative of deceased Dependant to claim Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *s.* 1, *sub-ss.* 1, 2, *and Sched. I., s.* 1, *sub-s.* (*a*) (i.)—*Maxim "Actio personalis moritur cum persona."*

The right of a dependant of a deceased workman to make a claim and take proceedings under the Workmen's Compensation Act, 1906, passes to the executor of the sole dependant who has died without having made a claim.

The maxim "Actio personalis moritur cum persona" is not applicable to cases under the Workmen's Compensation Act, 1906.

A workman in the employment of the appellants, a colliery company, was knocked down by a waggon while in the course of his employment on July 9, 1907. He died of his injuries on July 14. His mother, alleged to have been dependent upon him, died on October 16, 1907, without making any claim upon the appellants. Her executrix made a claim on December 10, 1907, under the Workmen's Compensation Act, 1906, as representative of the mother:—

Held, affirming the decision of the First Division of the Court of Session (Lord Dunedin dissenting), that the claim must be admitted in law.

Darlington v. *Roscoe & Sons*, [1907] 1 K. B. 219, approved.

O'Donovan v. *Cameron, Swan & Co.*, [1901] 2 I. R. 633, dissented from.

APPEAL from the First Division of the Court of Session, Scotland. (1) The appellants and defendants were the United

(1) (1908) S. C. 1215.

H. L. (Sc.) 1909

UNITED COLLIERIES, LIMITED. v. SIMPSON.

Collieries, Limited, and the respondent was Isabella Simpson or Hendry, executrix of the deceased Mrs. Marion Wilson or Simpson, widow.

Alexander Simpson was in the appellants' employment as a miner on July 9, 1907, when he was knocked down by a train of waggons and received injuries from which he died on July 14 following. Mrs. Marion Wilson or Simpson, the mother of the deceased miner, survived his death, but died three months later, on October 16, 1907, without having made any claim upon the appellants for compensation under the Workmen's Compensation Act, 1906, for the death of her son. The respondent was confirmed as executrix dative of the said Marion Wilson or Simpson on December 6, 1907, and in that capacity made a claim for compensation within six months from the time of the said Alexander Simpson's death in respect of the dependency of the said Mrs. Marion Wilson or Simpson upon the earnings of the said Alexander Simpson at the time of his death.

The case came before the sheriff substitute (A. S. D. Thomson) of Lanarkshire, and he found that the applicant (the now respondent) had no title to take proceedings, and he stated a case giving the above facts, the question of law being as follows: "Whether in the circumstances above set forth, the right of the mother of the deceased workman to make a claim or to take proceedings under the Act vested in the applicant (respondent) so as to entitle her to insist in the present application."

The First Division of the Court of Session (Lord Kinnear and Lord Mackenzie, Lord M'Laren dissenting) on July 18, 1908, answered the question of law in the case in the affirmative, recalled the determination of the sheriff substitute as arbitrator, and gave the applicant (now the respondent) expenses.

March 26, 29. *James A. Clyde, K.C.*, and *J. Carmont*, for the appellants. The decision of the Court below was wrong, for the respondent was not entitled to make a claim. The Act makes no provision for a claim being made by any one other than a dependant on the deceased workman or his legal personal

representative for behoof of a living dependant, except in the special case of a claim for expenses of medical attendance and burial: see s. 1, sub-s. 1, and the First Schedule, s. 1. (1)

Sect. 2 of the statute enacts that a claim shall be made for compensation, and in the case of death within six months from the time of death. This section implies plainly that where the accident is not fatal the workman himself must make the claim. The definition clause, s. 13, provides that "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit

(1) The Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), enacts, s. 1, sub-s. 1: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

Sect. 2, sub-s. 1: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless . . . . the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death."

First Schedule: "(1.) The amount of compensation under this Act shall be—

"(*a*) where death results from the injury—

(i.) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, ...

(ii.) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum . . . . as may be agreed upon . . . . to be reasonable and proportionate to the injury to the said dependants; and

(iii.) if he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds;"

Sect. 13 of the Act defines "workman," and continues:—"Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable."

See opinion of Lords Loreburn L.C. and Macnaghten for other parts of the Act.

H. L. (Sc.) 1909

UNITED COLLIERIES, LIMITED v. SIMPSON.

compensation is payable." The expression "other person" refers solely to the person claiming under the First Schedule the expenses of medical attendance and burial, not exceeding 10*l*. The Act must therefore be taken to have contemplated a living dependant who claims either directly or through the workman's personal representative. As was said by Lord M'Laren in the Court below, "It is a condition of the dependant's right to compensation that he shall make a claim within the statutory period, and if he does not choose to make a claim, or if he is prevented by death from making a claim, the employer's liability (which is contingent on a claim being made) comes to an end." Substantially the same question was raised in the Court of Appeal in Ireland in *O'Donovan* v. *Cameron, Swan & Co.* (1), and it was there decided that the making of a claim by the dependant was a condition precedent. That case is directly applicable to the present. No doubt against that case there are certain dicta in the English case of *Darlington* v. *Roscoe & Sons* (2), but there the dependant had made a claim before her death. The respondent maintains that the right to compensation vested in the dependant on the death of the workman. That view cannot be supported, for the right to compensation is a purely alimentary one which did not vest in the dependant. The Act was intended not to create any general obligation on the part of the employers, but only to secure to those who were dependent on the earnings of the workman compensation for pecuniary loss. The statute, in fact, confers no express right on any dependant to receive any part of the fund paid as compensation, but leaves it in the discretion of the Court to allocate or withhold payments, and for this purpose places the control of the funds in the hands of the Court: see ss. 8 and 9, First Schedule. Such powers as are conferred on the Court are quite incompatible with the idea of a vested right in any dependant. A dependant may never receive the capital sum, and where one of several dependants dies it is within the discretion of the Court to increase the shares of the survivors without reference to the deceasing dependant's representatives. Such discretionary powers in the Court indicate that compensation is purely alimentary, and that the right to it

(1) [1901] 2 I. R. 633. (2) [1907] 1 K. B. 219.

is not an absolute vested right in the dependant. Other intransmissible rights are well recognized, for example those to which the maxim "Actio personalis moritur cum persona" applies. The option could be exercised by the mother of the deceased, but not by the executrix of the mother. The option can only be exercised by the living dependant. And it is a condition precedent to the maintenance of any right that a claim is made by a dependant: see Lord Halsbury L.C. in *Powell* v. *Main Colliery Co.* (1) and *Greenhorn* v. *Addie.* (2) If the dependant has a vested right to compensation, that right is intransmissible at common law to executors or assignees. Lord M'Laren was right in saying that it is a necessary condition to the conversion of a claim into a debt that the claim should be made by a dependant, and in the absence of such a claim there is no creation of a debt which is transmitted to the executor.

Scott Dickson, D.F., and *E. J. Macgillivray* (the latter of the Scottish and English Bar), for the respondent. The Court below was right. The Act creates a duty to pay money to those who have suffered a patrimonial loss. It is now a term of every contract of service that a right to compensation must be read into it. By the Act, First Schedule, s. 1 (*a*) (i.), a right to a sum of money as compensation vested in any dependant left by the deceased workman. If the right vested, it devolved upon the representative of the dependant on his death. As to weekly payments, see *O'Keefe* v. *Lovatt* (3); *Williams* v. *Vauxhall Colliery Co.* (4) The Act does not distinctly point out who is to make the claim, but there is no reason why a vested right to receive money is not transmitted to a representative. Provisions to restrain a dependant from squandering the compensation money do not prevent the right to it from vesting in him. The appellants endeavour to read into the Act a proviso that the claim must be made by the workman himself, or by a dependant, but it does not matter to the employer who makes the claim if it is made within the six months; the employer has nothing to do with the application of the money. If any person makes a claim that is enough. The case of *O'Donovan* v. *Cameron, Swan*

(1) [1900] A. C. 366, 370.
(2) (1885) 17 D. 860.
(3) (1901) 18 Times L. R. 57.
(4) (1907) 23 Times L. R. 591.

H. L. (Sc.) 1909 — UNITED COLLIERIES, LIMITED v. SIMPSON.

& Co. (1) was not well founded. But *Darlington* v. *Roscoe & Sons* (2), proceeding on the view that there was a vested right in the dependant, was correct. The observations in *Powell* v. *Main Colliery Co.* (3) are also of value. If the right to payment be vested in the dependant at the time of his death, then, apart from any question whether proceedings are pending in Court, the transmission of that right to his executors appears to follow as a necessary consequence of the law regulating his succession to movable estate. The maxim "Actio personalis moritur cum persona" has no application. The claim is for a capital sum of money, being more of the nature of a claim under contract than a claim arising ex delicto.

James A. Clyde, K.C., in reply.

The House took time for consideration.

June 24. LORD LOREBURN L.C. My Lords, the facts of this case are very simple. One Simpson, a workman in the employment of the United Collieries Company, was knocked down by a waggon while in the course of his employment on July 9, 1907. He died of his injuries on July 14. His mother, averred to have been dependent upon him, died on October 16, 1907, without making any claim upon the company. Her executrix, the now respondent, made a claim on December 10, 1907, under the Workmen's Compensation Act as representative of the mother. The question is, can that claim be admitted in law?

There are conflicting authorities prior to the decision of the First Division in this case. In Ireland the Court of Appeal decided a similar case adversely to the claim. In England the Court of Appeal expressed a different view. I think that the First Division was right in adopting the English authority, though the dissent of Lord M'Laren and the judgment of the Irish Court of Appeal have naturally led your Lordships to regard the case with some anxiety.

The Workmen's Compensation Act by its first section makes

(1) [1901] 2 I. R. 633. (2) [1907] 1 K. B. 219.
(3) [1900] A. C. 366, 370, 380.

the employer "liable to make compensation" in accordance with the First Schedule. In that schedule, in the event of death resulting from the injury, the amount of compensation for dependants wholly dependent upon deceased's earnings is expressly stated. As Lord Mackenzie says, it is not calculated with reference to the expectation of life of the dependant. In cases of partial dependence the amount of compensation is discretionary, subject to a maximum, but is not proportioned to the expectation of life. Now where the Act says that the employer is liable to make compensation in the event of death in case there are dependants, irrespective of their expectation of life, and they are described as the persons for whose benefit it is to be paid, that certainly looks like a debt arising on the death from employer to dependants. When I turn to the other provisions of the schedule I think they fit this view.

Paragraph 5 of the schedule requires payment in the case of death "unless otherwise ordered or hereinafter provided" into the county court, to be dealt with in discretion "for the benefit of the persons entitled thereto under this Act." This is, no doubt, in order to relieve the employer and ensure a proper custody, distribution, and application of the money, especially where there are minors or several dependants, or where there are persons for whom the county court judge thinks it advisable to take precautions.

The eighth paragraph also contemplates payment to a dependant. And though the ninth reserves a power to vary the apportionment, neither it nor any other paragraph proceeds upon any other view than that there is a definite right on the part of dependants as a class to the money, subject to a parental power of the Court in dividing and applying it for their advantage.

If there is this right, when does it arise or become vested? The statute evidently treats it as arising because of the workman's death. It seems to follow that it arises on the workman's death, unless some other event is fixed. Counsel for the appellants sought to invoke the second section of the Act, which declares that proceedings for the recovery of compensation shall not be maintainable unless notice has been given as soon as practicable and the claim for compensation made within six

H. L. (Sc.) 1909 — UNITED COLLIERIES, LIMITED v. SIMPSON. — Lord Loreburn L.C.

months. This is merely a bar to the remedy, unless conditions precedent to the remedy have been fulfilled, and is analogous to the numerous instances in which notice of action is required by statute. It does not help in determining when the right to compensation arises.

I observe that, in Lord M'Laren's opinion, if the claim is made within the statutory period, and the dependant dies before an award has been made, the right to an award of compensation has vested in the dependant, and a right to follow out the proceedings in the arbitration passes to the legal personal representatives. But if the claim has not been made, his Lordship thinks that the employer's liability is terminated by the death of the dependant. That opinion is entitled to the greatest respect, but I cannot agree. I cannot see why the claim instead of the death is to be regarded as the signal for the right to compensation vesting. And even if it were so, the Act does not require that the dependant himself should make the claim, and I do not see why that right to make the claim should not pass to the executor.

It seems to me, therefore, that, as the person represented by the respondent was the only dependant, her representative may properly claim all that she was entitled to, the right being transmissible as property. If there had been several dependants, the law would not be different, but the discretion of the county court judge or sheriff in apportioning might very likely render the proceedings unprofitable. No doubt this Act was intended to save dependants from the loss they might sustain by being deprived of the support they previously had from the deceased workman, and if the dependants themselves die they require it no longer. And it seems anomalous to enforce payment when no dependant is still living to require support. The Act, however, provides a fixed sum, and this must be taken as the statutory provision, whether in the event it is needed or not. Perhaps if this result had been foreseen it might have been guarded against; but that cannot affect the judgment of a Court of law.

LORD MACNAGHTEN. My Lords, notwithstanding the weighty opinion of Lord M'Laren and the unanimous judgment of the

Court of Appeal in Ireland in *O'Donovan* v. *Cameron, Swan & Co.* (1), I think the order under appeal ought not to be disturbed.

With Lord M'Laren, I put aside the semblance of argument founded on the maxim "Actio personalis moritur cum persona." The application of that maxim is limited to actions in which remedy is sought for a tort, or for something which involves, at any rate, the notion of wrong-doing. Liability under the Workmen's Compensation Act has no connection with any wrong-doing on the part of the employer. It does not result from any neglect or any default on his part. Indeed, in the case of death, or "serious and permanent disablement," the event may be the consequence of "serious and wilful misconduct" on the part of the workman while the employer is wholly free from blame, and yet compensation may be recoverable all the same.

On the other hand, I cannot agree with Lord M'Laren in thinking that a consideration of the policy of the Act leads to the conclusion that the liability of the employer is "contingent on a claim being made." Still less can I agree with the view expressed by one member of the Court of Appeal in Ireland, and apparently adopted by all his colleagues, "that on the construction of the statute it is clear there must be a living dependant on whose behalf the proceedings are to be taken."

It seems to me that the policy of the Act affords little help towards a right construction of its provisions. People may differ as to what the policy of the Act was exactly. Or if they agree as to the general policy of the Act, they may not agree as to the extent to which that policy was intended to be carried, or as to the propriety of supplementing an enactment by implying or introducing provisions to meet difficulties apparently not within the contemplation of the Legislature when the Act was being passed. Nor do I think that much help is to be got from general propositions of law, or from instances of the devolution of other statutory rights. The answer to the question now in debate must, I think, depend solely on the meaning of the statute itself, gathered from its own language without the addition of anything that is not necessarily implied.

At the same time, I must confess that the conclusion at which

(1) [1901] 2 I. R. 633.

H. L. (Sc.) 1909

UNITED COLLIERIES, LIMITED v. SIMPSON.

Lord Macnaghten.

I find myself compelled to arrive is not altogether satisfactory to my mind. Certainly the result in the present case is rather startling. Here is a workman who met with his death by accident arising out of and in the course of his employment with the appellant company. The company was not in the least to blame for the accident. Still, the Act says that in such a case compensation is to be paid by the employer to the workman's dependants. There was only one dependant at the time of the workman's death, an old woman wholly dependent on the workman's earnings. She died almost immediately after the workman was killed, and she died before making a claim. It has been held by the Court of Session that she became entitled and that her executor is now entitled at the very least to 150*l.*, a sum which may possibly be increased to 300*l.* on a calculation of the workman's earnings, without reference to the injury, if any, which she sustained by his death, and even though it may be evident beyond all question that she sustained no injury at all. That seems a large measure of compensation—larger, I apprehend, than what would have been given by the most generous and liberal employer before the Act was passed. It is a startling result. And the result is even more startling if you contrast what happens in the case of a sole dependant wholly dependent on the workman's earnings with what would happen in the case of two or more dependants each only partially dependent on his earnings. For example, a workman dies. The employer is liable to make compensation in accordance with the First Schedule of the Act. The deceased leaves, I will suppose, a sole dependant wholly dependent on his earnings, a grandmother, it may be, on her death-bed, or a granddaughter engaged to be married to a man well able to support a wife. The grandmother dies or the granddaughter is married before any claim for compensation is made. If the judgment under appeal stands, the married granddaughter or the personal representative of the grandmother, as the case may be, is entitled, by reason of the workman's death, to a considerable pecuniary benefit, wholly unexpected, and, some might think, wholly undeserved. On the other hand, if this workman had left both a grandmother and a granddaughter in similar circumstances, but each only partially dependent on his earnings, and the one

married and the other died before a claim was made, or even after claim made, but before determination of the amount of compensation, it might be that neither the granddaughter nor the representative of the grandmother would be awarded one farthing. Clause 1 (*a*) (ii.) of the First Schedule provides that, if the workman leaves only dependants in part dependent on his earnings, the sum payable in default of agreement is to be the amount which may be determined "to be reasonable and proportionate to the injury to the said dependants." There is no similar provision or qualification in clause 1 (*a*) (i.).

I now turn to the Act. It is enacted in s. 1 that, if in any employment personal injury by accident such as therein described is caused to a workman, his employer is liable to pay compensation in accordance with the First Schedule of the Act. The measure of liability is to be found in the First Schedule. But the liability falls upon the employer on the happening of the accident. It is the accident and nothing else which creates the liability. Is the liability contingent on a claim being made as Lord M'Laren considers? I do not think it is. The Act itself treats the liability as a subsisting liability from the very moment of the accident and as a present right. For instance, Sched. I. (15.) provides that if a workman, on being required so to do, refuses to submit himself for examination, "his right to compensation and to take or prosecute any proceeding under this Act in relation to compensation shall be suspended until such examination has taken place." Now the request for medical examination might, and indeed probably would, be made after notice of the accident but before any claim is put forward. And yet the Act speaks of the right to compensation as well as the right to take or prosecute proceedings as a right belonging to the workman. Then again, in s. 5 of the Act, sub-s. 3, there is included among preferential payments in bankruptcy the amount due in respect to any compensation "the liability wherefor accrued before the date of the receiving order." The accruer of liability spoken of in that section must date from the occurrence of the accident. Now, if the liability falls upon the employer by reason of the accident and as its immediate consequence, there is nothing, I think, in the Act to indicate that the nature or quality

H. L. (Sc.)
1909
UNITED COLLIERIES, LIMITED v. SIMPSON.
Lord Macnaghten.

of that liability is altered or affected by the notice of the accident or by the claim for compensation. Of course, if arbitration becomes necessary, there must be a claim in order to raise a question for arbitration. But in the normal case of agreement no claim is required. The Act might, of course, have made the claim a condition precedent, but it certainly has not done so in terms. And it is to be observed that in the present Act the requirements as to claim are less rigid than they were under the original Act. The failure to make a claim within the prescribed period is not now a "bar to the maintenance of proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

In my opinion the intention of the Act is shewn in one of the alterations made in the First Schedule to the original Act. In the absence of agreement the amount of the compensation in the case of death is now to be paid into Court, and the Court may keep its hand upon the money. But there is no provision for any refund. The absence of any such provision in the case of the dependant dying before the fund is exhausted seems to shew that the Act intended that when once the compensation was fixed the employer was to have no claim to a refund in any case. And if that is so in the case when a refund might easily have been provided for, it seems to me to shew that in the case of death, when the liability has once accrued and the right of the dependant has come into existence, it falls upon the employer to satisfy the liability, and that he has no further concern in the matter.

It seems to be admitted on all hands that, if a proper claim is made, the right of the dependant in the case of death is indefeasible, but I do not think that the claim is a condition precedent. And I think that the claim of a sole dependant wholly dependent on the workman's earnings is indefeasible on that dependant surviving the workman who has met with a fatal accident arising out of and in the course of his employment. If this is so, the claim in this case was made by the proper person—being made, as the Act prescribes, "by the person entitled."

For these reasons I am of opinion that the order appealed from should be affirmed.

LORD JAMES OF HEREFORD. My Lords, I was during the hearing in some doubt as to the decision in this case, but in the end I have come to the conclusion that the judgments which have been delivered by my noble and learned friends the Lord Chancellor and Lord Macnaghten are correct in every respect. I entirely concur in those judgments and in the reasons on which they are founded.

LORD SHAW OF DUNFERMLINE. My Lords, upon the death in July, 1907, of Simpson, a workman in the appellants' employment, a liability emerged under the Workmen's Compensation Act, 1906, upon his employer to compensate his mother as his sole dependant. She, however, died in October, without making a claim upon the company; and the question for determination is whether a claim in respect of this liability is maintainable by her executor, or whether, on the contrary, the fact of the dependant's death before lodging a claim extinguishes the liability created by the statute.

In support of the latter proposition there has been cited to us *O'Donovan* v. *Cameron, Swan & Co.* (1), decided by the Irish Court of Appeal. The maxim "Actio personalis moritur cum persona" appears to have bulked largely in the Irish case, and especially to have appeared of cogency to Lord Justice FitzGibbon and Lord Chancellor Walker. It was alluded to, rather than founded on, in the argument at your Lordships' bar.

My Lords, if this be an actio personalis, and if the maxim be generally or comprehensively applicable as a legal maxim, the pursuer's case cannot be maintained. This term itself has been analysed, and the history and scope of the so-called maxim have been examined by two very learned judges, namely, by Lord Neaves in *Auld* v. *Shairp* (2), and by Lord Bowen, then a Lord Justice, in *Finlay* v. *Chirney*. (3) As Lord Watson remarked in the case of *Darling* v. *Gray* (4), the maxim "has a very limited application in the law of Scotland." An actio personalis was eo nomine, or at least in connection with such a brocard, unknown to the law of Rome. I presume it is meant to be analogous to

(1) [1901] 2 I. R. 633.
(2) (1874) 2 R. 191.
(3) (1888) 20 Q. B. D. 494 at p. 502.
(4) (1892) 19 R. (H. L.) 31.

H. L. (Sc.) 1909 — UNITED COLLIERIES, LIMITED v. SIMPSON. — Lord Shaw of Dunfermline.

an actio in personam, but it cannot be completely analogous to that, because there were many actiones in personam which transmitted after death. Still further limiting the analogy, it must at least be confined to the actio injuriarum, one of the actiones in personam. As Lord Neaves shews, the reason why an actio injuriarum is not transmissible is that it is treated as a penal action, and "there is an obvious distinction in principle between an action of a penal or criminal character for punishment or for vindication of the law, and an action for money reparation."

Lord Neaves quotes with approval Mr. Bell's dictum (Principles, s. 546), "The civil action for reparation grounded on delict is not, like the penal action in criminal law, confined to the delinquent. The wrong-doer's representative is liable for reparation"; and as to those who suffer from a wrong he cites the judgment of Lord Wood in *Neilson* v. *Rodger* (1), where a claim for damages or even for solatium arises, "the right vests ipso jure and ipso facto prior to any proceeding or decree for its constitution." I may observe that this judgment of Lord Neaves is cited as an elaborate one and without disapproval in this House in the case of *Darling* v. *Gray*. (2)

My Lords, for the reasons I am about to assign, it is not necessary for me to say whether I go to the full length of the various dicta pronounced and cited by Lord Neaves, for, in my opinion, what your Lordships have to determine here is whether the liability and claim sanctioned by the statute do, or do not, in the reason and nature of the case transmit. As in nearly all, if not all, the cases in which it is cited, the maxim does not advance the position, and I observe that Lord M'Laren, even in his dissent in the present case, dissociates himself from the Irish judges in founding upon it. The truth is that this maxim "Actio personalis moritur cum persona" is of doubtful origin, has produced confusion rather than guidance in specific cases, and is used rather to dress up a conclusion already formed than as a safe guide towards a conclusion. I agree with Lord Kinnear in thinking, so far as this case is concerned, that "it has no bearing on the question of the Workmen's Compensation Act."

(1) (1853) 16 D. 325. (2) 19 R. (H. L.) 31.

But apart from the alleged general principle to which I have referred, a specific contention is maintained under the Act just mentioned, namely, that while it may be true that the employer became liable in compensation to the extent of a quantified amount in money to the dependant, yet, until a claim had definitely been preferred for it, no right transmissible to executors emerged as against the employer. Stress is laid upon the manifest intention of the Act to favour dependants as such.

My Lords, the Irish judgment referred to and the dissent of Lord M'Laren in the Court below in this case compel very careful consideration of the point. Substantially, I do not think it doubtful that upon the one hand the statute creates a liability and upon the other a right, and that these two things are correlative to each other. It may be convenient, therefore, to consider what was the nature of the liability of the employer under the statute, and in particular whether it, upon its side, had the element in it of transmissibility. Upon this point s. 5 of the Act is not without importance. It provides (sub-s. 3) for the case of the bankruptcy or winding-up of the employer's firm, and stipulates that "there shall be included among the debts . . . . to be paid in priority to all other debts an amount not exceeding in any individual case 100*l.* due in respect of any compensation the liability wherefrom accrued before the date of the receiving order or the date of the commencement of the winding-up."

In this sub-section it is accordingly clear that the liability to the workman is, in the circumstances mentioned, not only to be treated as a debt, but as specially preferable among debts. And the kind of thing which is thus created a debt is "compensation, the liability wherefor accrued before" bankruptcy. Take another case, namely, under sub-s. 1, which provides for bankruptcy of an employer who is insured "in respect of any liability under this Act to any workman." The sub-section provides that the insurer's liability to the employer is, in the case of the employer's bankruptcy, to be transferred to and vest in the workman.

My Lords, in view of these provisions of the statute it seems to me impossible to contend successfully that the liability of the employer was not of the nature of a debt.

I have already stated my opinion that the right of the

H. L. (Sc.) 1909

UNITED COLLIERIES, LIMITED v. SIMPSON.

Lord Shaw of Dunfermline.

dependant is correlative to the liability of the employer, and if the liability of the employer be of the nature of a debt, the right of the dependant is that of a creditor in such debt. It is true that the creditor's right is not enforceable by action in the ordinary case after six months from the date of the death, but I do not think this limitation of time for a remedy affects the quality of the right. And I think it is a misuse of the term "condition precedent" to apply it, as is attempted, for the purpose of extinguishing the debt, simply because for obvious reasons there is a limitation of the period of a right to sue. On both sides of the account, whether as a liability and debt of the employer on the one hand, or a right and asset of the dependant on the other, I think the principle of transmissibility applies. It would be strange if a liability is so little personal in the employer's case that it transmits against his insurers and against his bankrupt estate, and yet that the corresponding right should be so completely personal to the dependant of the workman that it forms no part of the dependant's executory estate.

My Lords, the case which I figure as not at all improbable under the statute is a case (like the present) of a sole dependant who is left suddenly to make arrangements for her future—arrangements which may involve advances or credit to her until compensation is actually paid. And when it is urged that liability flies off because a claim had not been preferred, it must be remembered that the omission to claim may be accounted for by reason of sickness, or for other very intelligible and excusable causes. Her death prior to the claim would not lessen the sum payable because that sum is quantified without any reference to the duration of the life of the dependant, and I agree with Lord Mackenzie that it seems likely that "it was intended the right to compensation should vest from the time of death so as to form a fund of credit." There do not appear to me to be any sound considerations of policy against this.

With regard to the liability itself, it appears to me that under s. 1 of the statute that liability emerges if (1.) the death or injury have occurred by accident arising out of or in the course of the employment; (2.) that the person injured should be a

workman; and (3.) that the workman should leave dependants, that is to say that dependants should be in existence at the time of death. I do not think that a further condition is added by the statute, namely, the survivance of the dependant; and it appears to me that the liability emerges and the right accrues although the dependant should predecease (1.) either actual payment, (2.) an action for payment, or (3.) a claim. This, of course, in no way removes the necessity for those who do make the claim observing the statutory time limit.

I desire to express my concurrence with the terms of the judgment of Lord Kinnear in the Court below, and of Lord Collins (Master of the Rolls) in *Darlington* v. *Roscoe & Sons* (1), which case was, in my opinion, rightly decided.

LORD LOREBURN L.C. My noble and learned friend Lord Dunedin, who is unable to be present to-day, has asked me to read his judgment in this case.

LORD DUNEDIN. (Read by Lord Loreburn L.C.) My Lords, I am unable to agree with the opinion of the Lord Chancellor and of the majority of the learned judges of the Court below. I come to the same conclusion as that come to by Lord M'Laren and by the Irish Court of Appeal in *O'Donovan* v. *Cameron, Swan & Co.* (2)

The view of the majority of the First Division is based entirely on this, namely, that by statute on the death of a workman through accident arising in the course of his employment there is created a vested right in his dependant or dependants to a sum of money to be paid by the employer. If that is so, then I agree with the conclusion reached. In other words I agree with Lord Kinnear when he says, "Now if there is a statutory right to a sum of money accrued, I am unable to see any ground in law for holding that it does not transmit to the representative of the person to whom it accrued."

But is there such a vested right? If there were, it seems to me that it could be sued for. I cannot call to mind any vested right which cannot be asserted by action, unless statute takes

(1) [1907] 1 K. B. 219. (2) [1901] 2 I. R. 633.

H. L. (Sc.) 1909

UNITED COLLIERIES, LIMITED v. SIMPSON.

Lord Dunedin.

away right of action. Here there is no taking away of the right of action, unless such can be inferred from the provisions as to arbitration, and such provisions are not, in the case of a workman leaving dependants wholly dependent on him, in any way necessarily invoked: Sched. I. (1.) (*a*) (i.). Yet it has been said again and again in decided cases that no action lies for compensation, the only method being, failing agreement, to proceed to arbitration, and thereafter recover, by means of a registered memorandum. This leads me to examine with greater minuteness precisely what the right given is.

It is noticeable first of all that there does not exist what might have been expected, any creation of a right in phraseology positive in the recipient. The only actual creation of a right is in s. 1, sub-s. 1, and that is expressed as a liability on the part of the employer to pay. It is not said to whom the payment is to be made. But as the payment is to be made in accordance with the First Schedule, one naturally looks to the First Schedule to see to whom the payments are to be made.

The First Schedule begins with the case of death, an event which necessarily excludes the idea of actual payments to the workman himself, but does not exclude the idea of a vested right in the workman to receive, because such a right might be made good by executors. But the schedule at once puts an end to such an idea by providing that the sum payable is to be calculated according as he does, or does not, leave "dependants." Now dependants are not executors, they are not even a class known to the law, but they are a class created, so to speak, and defined by the statute. It then goes on to deal with the case of partial or total disablement. In neither of these cases is there any expression in terms of the right to receive. Naturally I look upon it as a necessary inference that there should be a right to receive in the persons mentioned or assumed, that is to say, dependants in the case of death, the workman himself in the case of incapacity. I am only concerned to notice that there is nothing so far in expression which points to any period of vesting of a right. As I understand the judgment, however, it is said that once you get the liability to pay, and the corresponding right to receive, there is no reason why you should not hold

vesting to take place at the date which determines the right to receive. But is this consistent with other parts of the statute? I cannot imagine that in this matter there should be a difference between the right of the workman and that of the dependants. The respective dates would then be the accident and the death. The necessities of the dependants, says Lord Mackenzie, commence at the death. The necessities of the workman similarly commence at the accident. But surely it is clear that so far as the workman is concerned he has no vested right as from the accident. Take the case of a workman who is injured, lies for several weeks ill, and then dies, no payment having in the meantime been made. Can it be doubted that the dependant would be entitled to the whole three years' earnings, or 150*l.*? But if the opposite theory is correct, the right to the sum due for the weeks of illness ought to be given to the executors; and there is then the extraordinary anomaly in s. 1 (*a*) (i.) of Sched. I., that there is no provision for the deduction which would be made if the payments had been made to the workman himself. Up to this point, therefore, I leave s. 1 of the schedule and find no provision as to vesting, but rather indications the other way.

I now come to s. 2 of the statute. This seems to me to define the only way in which the right created by the statute is to be made available, namely, by proceedings under the Act; and these proceedings must be taken within six months, and are subject to the further condition precedent that notice must be given of the accident. I do not detail the provisions as to the method of arbitration, which are familiar. It is enough to know that they end in a finding which fixes a compensation for which no decree or judgment can be given by the assessing tribunal, but which finding, being registered in the form of a memorandum in the books of a specified Court, can then be enforced as a decree at law.

Even here, if the finding is registered, and execution proceeds upon registration, the employer does not pay to the dependants, he pays into Court: Sched. I. (5.). The subsequent directions as to the power of the Court seem to me to be against the idea of a vested right. I do not consider this argument as conclusive, because I am not insensible to the explanations given by Lords

H. L. (Sc.) 1909 UNITED COLLIERIES, LIMITED v. SIMPSON. Lord Dunedin.

Kinnear and Mackenzie. But, such as they are, they seem to me to point in the direction to which the other parts of the statute have inclined me.

My view on the whole matter is that the whole position is statutory and anomalous, and that there is in the proper sense no vested right conferred, but merely a right to take proceedings of a certain kind which will result in the recovery of money; that the right to institute such proceedings, which is only given inferentially, cannot be extended beyond the recipients specified by the Act, namely, the workman himself, his dependants, or the persons who, failing dependants, have defrayed the expenses of his funeral, each in the appropriate case; and that consequently in the present instance, no proceedings having admittedly been taken by any of these three classes, the present proceedings are precisely excluded by the wording of s. 2. I do not find any difficulty in reconciling this view with the provision as to preferential debts in s. 5, because that section is equally workable whether the liability is held to "accrue" at the one period or the other.

If it is said that this result is reached by a narrow and metaphysical construction of the sections, I answer that if we abandon textual construction and go to general considerations, then I think that Lord M'Laren's view as to the general policy of the Act is irresistible. The Act was passed in order to treat as an expense of production the sum necessary to compensate a workman during his disablement or his true dependants after his death; not to benefit persons who had no connection with the workman at all.

The reductio ad absurdum of the opposite result is reached when we consider that in the case of a bastard dependant who has made no claim it is the Crown who under the present judgment is entitled to prosecute it. And, further, though I agree with the criticism made upon the opinions of some of the Irish judges, namely, that this not being an actio, the maxim "Actio personalis moritur cum persona" cannot apply, yet I think the argument is true enough in substance. For after all there is an underlying common sense to the maxim, and that common sense is, I think, equally outraged in this case as it would be in cases falling under the maxim if the maxim were not given effect to.

Lord Kinnear says he is not moved by the argument as to the policy of the Act, because the question is not whom did the Act mean to favour, but what is the quality of the right conferred. But surely the policy of the Act may throw light on whether it was intended to give a vested right or not. And if I find, as I do, indications pointing in opposite directions as to whether the right given is a vested one as at date of the accident or death, or is only given when made good for proceedings, then I am moved by the consideration that the latter view makes the effect of the Act what its title denotes, namely, to give "compensation" to some one who has lost by the accident, i.e., the workman himself or those actually dependent on him, while the other view which has prevailed in the judgment is to give a windfall to those who have never suffered, at the expense of those who were never intended to make a contribution to such a class.

Ordered that the appeal be dismissed with costs.

Lords' Journals, June 24, 1909.

Agents for appellants: *A. & W. Beveridge, for W. T. Craig, Writer, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for respondent: *Smiles & Co., for Hay, Cassels & Frame, Writers, Edinburgh, and Simpson & Marwick, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1909 *June* 29.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION . . . . } Appellants;

AND

MRS. JANET ROBERTSON (or HUNTER) . Respondent.

Insurance—Accident—Condition in Policy—Claim to be made within a Year of Registration.

In a copy of Letts's Diary for the year 1906, of which the respondent's husband was owner, there was a coupon policy of insurance which stated that a thousand pounds would be paid to the executors of any owner of the diary fatally injured in a railway accident if he had caused his name to be registered at the head office of the appellants, an insurance company, and if the claim was made within twelve months of the registration. The respondent's husband filled up the form of application for registration by inserting his name and address and the date, December 25, 1905, and forwarded it to the appellants' office. The appellants kept no register, but date stamped and filed the applications. The respondent's husband received a letter from the appellants, dated January 3, 1906, enclosing an official acknowledgment, dated December 29, 1905, of the registration of his name as being insured against accidents in the terms of the coupon. He was injured in a railway accident on December 28, 1906, and died the next day. The respondent, his executor, gave notice of the claim on January 2, 1907. The appellants denied liability, on the ground that the date of registration was December 27, 1905, and that the insurance ended on December 27, 1906:—

Held (affirming the decision of the Court of Session), that the twelve months within which the claim must be made had not expired when the claim was made, January 2, 1907, for, there being no regular register, the date of registration must be taken to be the date when the bundle of applications, containing that of the deceased, were arranged alphabetically and filed; and that, in the absence of any definite proof of this date, it must be held, as against the respondents, to be January 3, 1906, the date of the letter containing an official acknowledgment of the registration, and that the claim was accordingly made within the prescribed period.

Appeal from the First Division of the Court of Session, Scotland. (1) The appellants were the General Accident, Fire and Life Assurance Corporation, Limited. The respondent was Janet Armstrong Robertson or Hunter, widow and executrix of the late

(1) (1909) S. C. 344.

Adam Turnbull Hunter, who was injured in the Elliot Junction Railway accident on December 28, 1906, and died the following day, December 29, 1906. He held a coupon insurance policy of the appellants, and notice of his death was given to them by Mrs. Hunter on January 2, 1907. The appellants denied liability, on the ground that the deceased's insurance with them had expired before the accident occurred, and also that the claim was not made in time. Mr. Hunter purchased on or before Christmas Day, 1905, a Letts's Diary for 1906. It contained, inter alia, the following coupon insurance policy:—

"The General Accident Assurance Corporation, Limited.

"ONE THOUSAND POUNDS will be paid under the following conditions by the above corporation to the heirs executors or administrators of any person killed solely and directly by bodily injuries received in an accident to the ordinary railway . . . . while travelling in a passenger carriage of a passenger train . . . . or who shall have been fatally injured thereby, should death result within three calendar months after such accident . . . .

"Provided that at the time of such accident the person so killed or injured was the owner of the publication in which this insurance coupon is inserted, that such person had duly caused his or her name to be registered at the head office of the corporation in Perth and had paid the fee for registration and cost of acknowledgment and that notice of claim is sent to the registered office of the corporation at Perth within fourteen days of the occurrence of the accident and that such claim be made within twelve months of the registration of the holder's name.

"Form of application for registration $\frac{\text{L. C.}}{2}$

"(To be detached at the dotted rule and forwarded in a closed envelope to the Insurance Company.)

"To the General Accident Assurance Corporation, Limited, General Buildings, Perth, N.B.

"In accordance with the terms of the insurance coupon to which this is attached I request you to register my name as below for which purpose and also to cover cost of acknowledgment I enclose remittance value 6*d*.

H. L. (Sc.)
1909
GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION v. ROBERTSON.

"Full name" (as filled up by Mr. Hunter), Adam T. Hunter.
"Full address" (2, Wilton Hill, Hawick).
"Profession or occupation" (commercial traveller).
"Date" (December 25 1905).

The policy was backed, inter alia, "The General Accident (Fire and Accident) Assurance Corporation, Limited, Coupon Insurance Policy, No. A. Name of owner, A. T. Hunter. Address, Wilton Hill, Hawick. 6*d.* paid. Chief office, &c." Mr. Hunter filled up and posted the counterfoil on December 25, 1905. It was admittedly received at the appellants' office in Perth on December 26, 1905. As the appellants kept the 26th as well as the 25th as a holiday, it was not opened until the 27th, and on that day was impressed with the stamp "6*d.* 27 Dec. 1905." Some short time after, probably December 29, 1905, it was marked with its running number, "L.C. 7727," which meant Letts's continental second year, No. 7727.

Mr. Hunter wrote to the appellants on December 25, 1905:—

"Dear Sir,—Enclosed please find my coupon fully signed. I take it the 6*d.* covers all the policy both accidents and sickness. Is that so? What is the 1*s.* fee for? Your kind reply will oblige."

They replied:—

"Perth, 3rd January, 1906.

"Dear Sir,—*Re* Messrs. Letts's coupons. Enclosed please find official acknowledgment of the registration of your coupon and in reply to your enquiry same covers you for accident and sickness as specified thereon. The 1*s.* registration fee covers in addition to the United Kingdom and continent of Europe accidents to passenger steamers."

The enclosure (No. 7 of process) was as follows:—

"Official acknowledgment to Adam T. Hunter, Esq., by the General Accident, Fire and Life Asssurance Corporation, Limited, dated 29th December, 1905.

"$\frac{\text{L. C.}}{\text{No. 2}}$ 7727.

"Dear Sir (or Madam),—We have received your intimation of the purchase of Messrs. Charles Letts and Co.'s insurance

coupon, with 6*d.* in stamps enclosed, and have registered your name as being insured against accidents in the United Kingdom and on the continent of Europe in terms of the said coupon."

A joint minute of admissions for the parties set out—

(3.) "That the said letter, coupon slip and remittance were delivered at the defenders' office on Tuesday, 26th December, 1905, which was observed as a holiday at the defenders' office."

(4.) "That the defenders' usual practice with regard to insurances under the said coupon insurance policy was as follows: (1.) Each day, not being Sunday or holiday, all letters received containing coupon slips and remittances were opened; the coupon slips and, if accompanied by letters, the accompanying letters were stamped with the date of receipt and the value of the registration fee; the coupon slips were collected into classes according to the value of the registration fee; and the total number of each class and the total amount of remittances received in each class were entered in a book, which is No. 16 of process kept by the defenders entitled 'Number of coupons received daily from 24th April, 1903, to ——'; (2.) subsequently, and not necessarily on the day of receipt, a printed form of acknowledgment was filled up for each coupon slip, with the name of the assured, the date when the acknowledgment was filled up, and a reference number, and the filled-up acknowledgment was enclosed in an envelope and dispatched to the assured with or without a special letter according as the assured had or had not requested special information; (3.) each class of coupon slips was then made up into separate bundles arranged in alphabetical order according to the first letter of the name of the assured, each bundle containing not more than 100 slips, but including sometimes slips of more than one date of stamping, and such bundles were filed until the liability thereon expired."

(6.) "That No. 22 of process is a specimen bundle of 6*d.* coupon slips under the letter 'H' that the slips in the said bundle are stamped 27th and 28th December, 1905, and were dated by the senders thereof as follows:

18th December, 1905 . . . 2 coupons
(and various dates to)
1st January, 1906 . . . 2 ditto

H. L. (Sc.) 1909

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION v. ROBERTSON.

"That coupon slips sent in to the defenders were occasionally post-dated by the sender thereof."

(7.) "That the coupon slip sent in to the defenders by the late Mr. Hunter, No. 19 of the process, bears to be stamped by the defenders on 27th December, 1905, and that it formed one of the coupon slips in the bundle No. 22 of process."

(8.) "That No. 7 of process is the formal acknowledgment of the said coupon by the defenders, that it bears to be dated 29th December, 1905, but was not dispatched to the late Mr. Hunter until 3rd January, 1906, when it was enclosed and sent along with the letter (copy) No. 14 of process."

(10.) This paragraph gave power to the Court to draw inferences of fact from the above admissions.

A proof was allowed and some evidence given as to the practice of stamping the coupons, but the joint minute for the parties covered this evidence.

The Lord Ordinary (Lord Johnston) held on November 27, 1907, that the appellants were liable, and this decision was adhered to by the First Division on November 24, 1908. (1)

Ure, L.A., and *George A. Scott*, for the appellants. The decisions of the Courts below were erroneous. Registration of the name of the assured within the meaning of the policy was duly accomplished on December 27, 1905, when the application form sent by the late Mr. Hunter was duly stamped, placed in a bundle with others of the same class, and entered. The contract was completed by Mr. Hunter's acceptance of the offer made by the appellants in the coupon policy. Nor was it necessary to constitute registration within the meaning of the policy that any acknowledgment should be issued, for registration is necessarily a domestic act. Even if the appellants are to be held strictly to their averment, it is quite consistent with registration being completed on the day when the coupon slips were received and stamped. Registration does not depend upon whether the coupon slips were put into bundles, an operation which may be altered or undone at any time, but upon the act of stamping coupled with entry in the book of coupons received—unequivocal

(1) (1909) S. C. 344.

acts which cannot be undone. The appellants are therefore entitled to succeed, because neither did the accident occur nor was the claim made within twelve months of registration. But, in the second place, it is submitted as an alternative view that registration must be held to date back at least to December 29, 1905, because that was the date upon the formal acknowledgment issued to the assured by the appellants and stating that the assured had been registered. With regard to the actual date of registration, the appellants contend that the name of the deceased was registered upon December 27, 1905, that being the day on which the coupon was received by the corporation. If December 27 was not the date of registration, then there was no registration at all, and there was an end of the appellants' liability. The coupons as received were stamped, made up into separate bundles, and tied, the bundles being opened at a later date to be arranged in alphabetical order. What was done is explained by the clerk of the appellants in her evidence where she said, "When we receive a coupon we take off the stamps and postal orders attached thereto and then we arrange all the different classes of coupons, and we stamp them with a date stamp with a date when we get the coupon, and after that they are given out to different girls to acknowledge." In this case it was clear that the number was put on the coupon belonging to the deceased some days previous to December 29, 1905. The same witness also states that "they always stamp the coupons with the date on which it was received." The appellants' contention, on the evidence, was that the coupon was received on December 27, and whether registered or not on that date did not matter. The receipt of the coupon fixed the date of the corporation's liability, and that was so even if the coupon was not acknowledged. The corporation were bound the moment the coupon was received. The appellants' contention is that the contract of insurance was completed when the coupon and premium were received, and that the risk they undertook during twelve months commenced to run from that date. That registration was on December 27. The claim must be made "within twelve months of registration," and if the accident took place on the last day of the twelve months, then, if no claim was made at once, a claim made the next day would be too late.

H. L. (Sc.) 1909

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION v. ROBERTSON.

Scott Dickson, D.F., and *Munro* (both of the Scottish Bar), for the respondent. The facts shew an effective contract, and the only question is, When did the contract come to an end? In other words, What was the registration and what was its date? The appellants give four possible dates as the date of registration, but when it appears that they have to do something which constitutes registration they are bound to condescend on the exact date. The appellants have failed to prove the cardinal date, which is required to relieve them of liability.

Ure, L.A., replied.

The House took time for judgment.

June 29. LORD LOREBURN L.C. My Lords, I think this appeal fails, though the reasons which have led me to this conclusion are somewhat different from those which are relied upon by the Scottish Courts.

The late Mr. Hunter was injured in a railway accident on December 28, 1906, and died the next day. He had insured with the appellant company, the defenders in this action, and the questions were whether the risk under the contract with the defenders was a subsisting risk on December 28, 1906, and whether claim was made under the insurance contract within twelve months of the registration of Mr. Hunter's name by the defenders, whatever "registration" may mean.

In view of these controversies it is necessary first to ascertain what the insurance was. The defenders inserted in Letts's Diary what they called a coupon insurance policy, announcing that they would pay 1000*l.* to any person killed in a railway accident (or under other circumstances immaterial to this case) on certain conditions, one of which was as follows: "Provided that at the time of such accident the person so killed or injured was the owner of the publication in which this insurance coupon is inserted, that such person had duly caused his or her name to be registered at the head office of the corporation in Perth, and had paid the fee for registration and cost of acknowledgment, and that notice of claim is sent to the registered office of the corporation at Perth within fourteen days of the occurrence

of the accident, and that such claim be made within twelve months of the registration of the holder's name."

Nothing beyond this appears in the document which fixes either the commencement of the insurance or the duration of it, or the date of its expiry.

This singular document has been regarded by all the judges who have heard this case as an offer by the defenders which can be accepted, and a contract so made, by any person who complies with the conditions. I entirely agree with this view. It is admitted that Hunter did comply with all the conditions necessary to create a contract. He sent on December 25, 1905, the form of application for registration called the coupon slip with the necessary remittance. This was an acceptance on his part, and the contract of insurance, in my opinion, commenced, if not on December 25, 1905, when the letter was posted, then at all events on December 26, when it was delivered, or on December 27, when it was actually received by a person in defenders' employment. I will not enter upon the nice point when a contract is concluded by correspondence. On December 27, 1905, at latest, the risk attached; and it attached whether or not registration was effected on that day, because if it was not effected the only persons to blame were the defenders. The late Mr. Hunter had fully done his part, and they could not take advantage of their own default.

That being so, how long was the insurance to continue? On this the documents are silent, except for the provision which I have quoted, that the claim must be "made within twelve months of the registration of the holder's name." This involves that when once the defenders have registered the name no liability can arise more than twelve months after the date of registration. On the other hand it is quite possible that the accident may have happened within the twelve months and yet no claim been made within the twelve months, which gives to the defenders the advantage of the time elapsing between accident and claim. If, however, there is no registration, then the time during which the liability continues is protracted, and protracted, as it seems to me, without limit; or if registration is delayed, then the cesser of liability is deferred accordingly. The defenders

H. L. (Sc.) 1909

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION v. ROBERTSON.

Lord Loreburn L.C.

had it in their power to abridge the period of liability by instant registration.

In considering, therefore, whether this contract of insurance, which commenced at latest on December 27, 1905, was still in force on December 28, 1906, the date of the accident, and whether the plaintiff can succeed, two things are to be ascertained, first, what was the date of the registration of Hunter's name; secondly, on what date was the claim made.

Registration of the name is not whatever defenders chose to call it, but must mean something in the nature of a record which may be available for use if disputes arise. It was not enough that a date stamp was impressed on Hunter's coupon slip on December 27, 1905, nor that this slip was temporarily placed in a bundle with others on which the same fee had been paid, nor that the daily sum total of remittances, including Hunter's 6*d.*, was entered in a book. No name whatever was entered in any of these processes, and no record of a name preserved except for a few days.

Nor do I think the acknowledgment with a reference number, dated December 29, 1905, but sent to Hunter on January 3, 1906, was a registration of his name. It was merely a receipt for the form or coupon slip he had sent. But I do think that when Hunter's coupon slip was taken from the bundle in which it had been placed temporarily, and was placed in another bundle alphabetically and that bundle filed to be kept "until the liability thereon expired" (to use the words of the joint minute of admissions), then the name of Hunter was registered. It then for the first time appeared on a record adapted and available for reference, and permanent so far as permanency was required. It does not appear in the evidence when that was done, but as the bundle in question (No. 22 of process) contained other coupon slips dated as late as December 31, 1905, and January 1, 1906, it cannot have been done before January 1, 1906. Very likely it was not done till later—almost certainly after January 1, for the bundle includes a slip of that date. Now the claim was made on January 2, 1907, and the defenders have not proved that registration took place before January 2, 1906, or indeed at what time it did take place.

It is a matter peculiarly and solely within their knowledge, and the burthen is on them to prove this if they can. So far as the evidence goes, the fact that they did not send their letter of acknowledgment to Hunter till January 3, 1906, seems to shew that the act which constituted registration was not prior to that date, for in the joint minute of admissions the process which I regard as the registration is treated as a thing subsequent to the sending of the acknowledgment.

Accordingly I am of opinion that the registration must be taken to have been within twelve months of the claim, not merely because the defenders have failed to prove the contrary, but also because upon a balance of probabilities I infer that was the fact for the reason stated. By the 10th paragraph of the joint minute I am entitled to draw inferences of fact.

It follows that the accident occurred within the period of insurance and the claim was made within twelve months of the registration.

LORD ASHBOURNE. My Lords, I concur.

LORD JAMES OF HEREFORD. My Lords, I also concur.

LORD GORELL. My Lords, I have felt some doubt originally with regard to this case, owing to the vague terms in which the policy is couched and the manner in which the company dealt with the coupons ; but, having read the judgment which has just been delivered and the judgment which is about to be delivered by my noble and learned friend on my right, I concur in those judgments.

LORD SHAW OF DUNFERMLINE. My Lords, the respondent's late husband, Adam Turnbull Hunter, was injured in the Elliot railway accident on December 28, 1906, and he died on the following day. Messrs. Letts, publishers of a diary, had made arrangements which included the payment of 1000*l.* to the appellants, an insurance company, under which purchasers of the diary might insure, inter alia, against accident under the conditions contained in a document which is called a coupon insurance policy. The provisoes of the policy are five in number. It is admitted that

H. L. (Sc.) 1909

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION v. ROBERTSON.

Lord Shaw of Dunfermline.

four of these provisoes were complied with, namely, (1.) that the deceased was the owner of the Letts publication; (2.) that he had duly caused his name to be registered at the head office; (3.) that he had paid the fee for registration and cost of acknowledgment; and (4.) that notice of claim was sent to the registered office within fourteen days of the accident. But it is said that the fifth proviso has not been complied with, namely, "that such claim shall be made within twelve months of the registration of the holder's name."

This is a difficult question. I observe, in the first place, that while the terminus a quo of this insurance contract, namely, the date when the deceased accepted the open offer contained in the printed policy, is definite, the terminus ad quem is left indefinite. Why this should be so I do not know. It would have been easy to stipulate that the insurance should last for twelve months from the making of the contract and to stipulate a time within which, after the expiry of the twelve months, claims must be made. This was not done. There is no time stated for the duration of the contract. What is provided is that notice of a claim is to be sent to the registered office within fourteen days of the accident, and that "such claim be made within twelve months of the registration of the holder's name." When registration is to take place and what it is to consist of are not stated. It may be assumed that if registration took place promptly upon the execution of the contract these contracts would at least in practical effect have lasted for less than twelve months; because, in the event of a person dying at the end of a year from the execution and simultaneous registration of the contract, it is pretty clear that some days might naturally elapse before the notice of claim under the policy was sent forward. In all these cases the insurers under this policy would stand free, and they could successfully resist the argument that they had made a twelve months' insurance.

My Lords, this appears to me to make it incumbent upon the Court to be very scrupulous as to fixing the date of registration. The circumstances of the present case are somewhat peculiar. In ordinary transactions registration would assume a register of some separate kind, and in a ledgerized form familiar in

accounting. In this case there was no such book. It is not, however, necessary for me to pronounce upon whether that being so and there being no separate register there was therefore no registration, although I agree that the mere tying of the bundles of applications together when received was not registration, and that it is not proved when the subsequent reassortment and alphabetical arrangement of the contents of the bundles took place. But I think one fact in this case has been too much kept out of view, namely, that when the insured in such cases filled up the printed request for registration he enclosed a remittance "also to cover cost of acknowledgment." I think, my Lords, that when that acknowledgment was received the insurers and the insured were put upon a proper business footing, that is to say that the registration was then known to both parties and taken to have been accomplished as at the date when the acknowledgment was made and in due course despatched by the insurer to the insured. It would be of the worst example to permit acknowledgments to be made which narrate historically that registration had been achieved, it may be, months before. And, in short, I think the insurers under such a policy are liable to a person insured for twelve months after they have accomplished and acknowledged the registration in fact. On January 3, 1906, the appellants' general manager wrote to the late Mr. Hunter, "Enclosed please find official acknowledgment of the registration of your coupon." It reached Mr. Hunter on January 4. On January 2 of the following year, that is, within a year, Mr. Haddon, Mrs. Hunter's agent, wrote to the company giving notice of the accident, death, and claim. It appears, however, that the date of the "official acknowledgment," which was enclosed with the letter of January 3, 1906, was December 29, 1905, and the insurance company plead that they are thus in the position of having officially acknowledged the registration of the insurance more than twelve months prior to the notice of death. After much consideration, my Lords, I do not think this argument is sound. I think an acknowledgment is not something private in the books of the company, but is an acknowledgment to the insurer; that an "official acknowledgment to Adam

H. L. (Sc.) 1909

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION v. ROBERTSON.

Lord Shaw of Dunfermline.

Turnbull Hunter" is of no effect so long as it is lying in the archives of the company or until it is in course of transmission to the addressee; and, finally, until this acknowledgment is not only made, but in the course of transmission, there has been no datum arrived at upon which both parties to the contract could rely as the definite and specific time to which, namely, until twelve months thereafter, the insurance should run.

I may further say that in a transaction of this kind it appears to me that the onus of satisfying the Court as to when registration was de facto accomplished rests upon the insurance company, that they have left that matter in doubt, and that I concur with the judgment of the learned judges of the First Division upon that point. But I hold, further, as above stated, that the element of acknowledgment entered into the bargain of parties, and was indeed the crucial business point with regard to which the running of liability could be measured.

Ordered that the appeal be dismissed with costs.

Lords' Journals, June 29, 1909.

Agents for appellants: *Smiles & Co., for Bonar, Hunter & Johnstone, W.S., Edinburgh.*

Agents for respondents: *James Mellor & Coleman, for W. C. Johnstone, W.S., Edinburgh.*

[HOUSE OF LORDS.]

FORREST AND OTHERS . . . . . APPELLANTS; H. L. (SC.) 1909 July 1.

AND

MERRY & CUNINGHAME, LIMITED . . RESPONDENTS.

Mines and Minerals—Lease—Construction—Clause against working adjoining Minerals—Absolute Prohibition.

The pursuers were the trustees and proprietors of part of the lands of A. The defenders were tenants of the coal seams under the said lands, but the mineral field worked by the defenders comprised also coal seams under lands belonging to several adjoining proprietors which were worked by pits on the said lands of A. The whole was to be worked as one general scheme. The pursuers sought to enforce as absolute against the defenders the following prohibition contained in a minute of agreement of the same date as the leases:—"The second parties (the defenders) hereby undertake and bind themselves and their foresaids that from and after . . . . they will work the coal in the adjoining properties only to such an extent as to enable them to pay the several proprietors thereof such sums of lordship as will amount to but not exceed the fixed rents agreed by their existing leases to be paid to such proprietors respectively: Declaring that if in any year during the currency of this lease the sums payable to such adjoining proprietors shall exceed the said fixed rents (which amount in cumulo to 550*l.* sterling per annum) then and in that event the second parties shall be bound . . . . to pay to the first party (the pursuers' author) the sum of one penny per ton on every ton of coal worked from the lands of such adjoining proprietors in excess of the quantities necessary to make up . . . . the said fixed rents . . . . In consideration whereof the first party . . . . renounces from and after . . . . the right to exact the wayleave of one penny per ton presently payable to him":—

Held, reversing the decision of the First Division of the Court of Session, that the clause was an absolute prohibition and not one giving the defenders a licence to work as much coal as they pleased from beneath the adjoining lands so long as they paid the stipulated one penny per ton.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellants, Miss Jane Wilson Forrest and others, were the trustees of the late Mr. Forrest, of Auchinraith, Scotland, and were as such the proprietors of part of the lands of Auchinraith.

(1) (1908) 45 Sc. L. R. 290.

H. L. (Sc.) 1909

FORREST v. MERRY & CUNINGHAME, LIMITED.

The respondents, Messrs. Merry & Cuninghame, Limited, were tenants, inter alia, of coal seams lying in or under the said lands. The mineral field worked by the respondents at their Auchinraith collieries comprised the coal seams not only in and under the appellants' lands, but also the coal seams in and under lands belonging to several adjoining proprietors, and the purpose of this action was to restrain the respondents from working beyond certain fixed limits coal seams in that part of the mineral field which belonged to the said adjoining proprietors. The facts were given as follows by the Lord Ordinary (Lord Salvesen):

"The late John Clark Forrest was proprietor of the estate of Auchinraith, a property which contains valuable seams of coal. It adjoins certain small properties called Birdfield, Springwell, part of Auchinraith, and Aitkenfin; and since 1872 the coal in these adjoining lands along with the coal in Auchinraith has been let to the same tenants and wrought by pits in the lands of Auchinraith. The pursuers are the trustees of Mr. Forrest, and now own the estate of Auchinraith; and the defenders are a limited company, who are the successors of the original tenants of the mineral field.

"On January 4, 1889, Mr. Forrest granted a lease of the coal in his lands of Auchinraith to the defenders' authors for thirty-one years from the term of Whitsunday, 1888, for payment of a fixed rent of 2000*l.* per annum, or lordships in the lessors' option. By this lease Mr. Forrest conferred power on the tenants to sink pits for the purpose of working not merely the coal in the lands let by him, but also any coal in the adjoining lands. The consideration for this privilege was the payment to Mr. Forrest of a wayleave of a penny per 22½ cwts. provided for under a previous agreement, which was referred to and adopted in the lease. About the same time that this lease was entered into, leases were granted or existing leases modified and confirmed by the proprietors of the adjoining lands; and it is a fair inference that the whole of these deeds were the outcome of a general agreement between the various proprietors and the mineral tenants.

"Under the lease of January 4, 1889, it was provided that lordships, which Mr. Forrest was entitled in his option to exact

instead of the fixed rent, were to be paid to him according to a sliding scale, and that the wayleave of one penny per ton should be paid directly by the mineral tenants. The other proprietors also stipulated for a fixed rent, or in their option a lordship or a fixed sum of 7*d.* per ton of 22½ cwts. The sliding scale appears to have been very favourable to Mr. Forrest, for it provided that he should be entitled to payment of two-fifteenths of the average yearly selling price of the coal, in the event of that exceeding the lordship of 6⅔*d.* per ton of 20 cwts. Whenever accordingly the selling price of coal at the pit head exceeded 4*s.* 6*d.* or 5*s.* a ton, it was the tenants' interest, after they had taken sufficient coal from the lands of Auchinraith to pay the fixed rent, rather to work out the coal beneath the adjoining lands than to increase their output from the minerals of Auchinraith.

"Of even date with the lease the parties entered into a minute of agreement; and it is upon the construction of a clause in that deed that the main controversy turns. The clause is quoted at length in Condescendence IV., and by it the defenders' authors undertook and bound themselves 'that from and after the term of Whitsunday, 1893, they will work the coal in the adjoining properties only to such an extent as to enable them to pay to the several proprietors thereof such sums of lordship as will amount to but not exceed the fixed rents agreed to by their existing leases to be paid to such proprietors respectively: Declaring that if in any year during the currency of this lease the sums payable to such proprietors shall exceed the said fixed rents (which amount in cumulo to 550*l.* sterling per annum), then and in that event the second parties shall be bound, as they hereby agree and bind themselves and their foresaids, to pay to the first party and his foresaids (that is the pursuers) the sum of one penny per ton on every ton of coal worked from the lands of such adjoining proprietors in excess of the quantities necessary to make up or equal the said fixed rents payable to them as above mentioned.'

"In consideration whereof the first party gives up and renounces from and after the term of Martinmas, 1888, the right to exact the wayleave 1*d.* per ton presently payable to him."

H. L. (Sc.) 1909 FORREST v. MERRY & CUNINGHAME, LIMITED.

"The defenders contend that this clause read as a whole gives them the right to work out the coals in the adjoining lands as fast as they choose on payment of one penny per ton on all coal from such lands in excess of the quantities required to make up the fixed rents. In further support of their construction of the clause, the defenders maintained that so small a sum as one penny per ton could not be treated as a penalty for violating a prohibition, and they also founded upon the (fourth) clause in the same agreement quoted in answer 4."

That clause provided as follows:

"Although by the foresaid lease it is expressly provided and declared that should the lordship in any year fall below the amount of fixed rent, the second parties shall be entitled to make up the deficiency from the excess of lordship, if any, above the fixed rent which may be payable in any three subsequent years, it is hereby expressly provided and declared that the second parties shall only be allowed one year to make up any such deficiency which may have taken place from the excess of lordship above fixed rent, if any, and that in the year immediately following: Declaring, however, that this restriction shall not apply while and so long as the tenants restrict their output from the said adjoining proprietors' land, so that the lordships payable to them do not exceed the fixed rents of 550*l.* above mentioned."

"The defenders further point to the admitted fact that ever since 1893 there has been an average excess of output from the adjoining lands over the amount required to meet the fixed rents and lordships of about 55,000 tons per annum; and that notwithstanding, the pursuers and their authors have accepted the sum of one penny per ton on this excess, although it would have been far more to their interests to have insisted upon the output from their own lands being increased. Finally, they contend that the pursuers' construction of the clause if given effect to would be contrary to the good faith of the agreement made with the adjoining proprietors."

The Lord Ordinary held that he could not construe the clause as giving the mineral tenants a licence to work as much coal as they pleased from beneath the adjoining lands so long

as they paid the stipulated one penny per ton, and pronounced the following interlocutor (November 14, 1907): "Find that on a sound construction of the minute of agreement dated January 4, 1889, between John Clark Forrest and Merry & Cuninghame referred to in the summons the defenders are not entitled to work out the coal in the lands of Birdfield, Springwell, part of the lands called Auchinraith, and Aitkenfin to any greater extent than is required to enable them to pay to the several proprietors of the said lands such sums of lordship as will amount to but not exceed fixed rents amounting in cumulo to 550*l.* sterling per annum."

On January 10, 1908, the First Division recalled the Lord Ordinary's interlocutor and assoilzied the defenders from the conclusions of the summons.

The Lord President (Lord Dunedin) said, inter alia, "Agreeing as I do with the Lord Ordinary that this was the outcome of a general scheme, it seems to me that the construction of the clause which is urged by the pursuers is, if I may say so, in utterly bad faith as regards the arrangement with the smaller proprietors. I cannot believe that the smaller proprietors would have entered into their agreements which were unico contextu with the agreement founded on if they had known that such a clause was to be put in force against them, and I cannot believe that Merry & Cuninghame would have assented to such an arrangement . . . . Upon the whole construction, I come to the conclusion, opposite to that of the Lord Ordinary, that the meaning of the clause is that it is not to enforce prohibition, but is to fix a scale of payment if the coal is worked above a certain amount."

June 29, July 1. *Ure, L.A.*, and *Chree* (both of the Scottish Bar), for the appellants. The decision of the First Division is wrong. The clause in question is a prohibition against working more coal. The clause is a definite undertaking. It does not mean that the defenders can work so that the royalties exceed the rents on paying one penny per ton. In decisions on similar clauses it has been held that they do not confer on the tenants an option to contravene the provisions of the lease on payment of an alternative and higher rent made payable in that event: see *Mackenzie*

H. L. (Sc.) 1909

FORREST v. MERRY & CUNINGHAME, LIMITED.

v. *Craigie* (1); *Mackenzie* v. *Gilchrist* (2); *Cross* v. *Muirhead.* (3) In the first case there was a clause which was conceived to give an option, but this House held that it was a prohibition. There is not a single Scottish case where such a clause as this has not been held to be a prohibition. The respondents relied on the cases of *Woodward* v. *Gyles* (4) and *Leigh* v. *Lillie.* (5)

J. A. Clyde, K.C. (with him *Murray, K.C.*, and *Hamilton*) (all of the Scottish Bar), for the respondents. The decision of the Lord Ordinary was wrong; there were three or four little coalfields which had no chance of being worked separately. Therefore they were grouped, and it was arranged that if any coal was taken from surrounding coalfields through Forrest's estate he was to have one penny a ton. The basis of the agreement in 1872 was that the whole field was to be worked as one concern. Assuming that the clause is an absolute prohibition, Forrest's coal might be exhausted in 1910; then the tenant would be prevented by such a decision from working the adjoining fields to a greater extent than the total head rents. Surely that was a prohibition John Clark Forrest had no interest in making; nor had any one who had been a party to the arrangement here thought of the construction now urged. Any such construction was a breach of good faith, inasmuch as the tenant was granted the leases to work all the different fields of coal as a whole.

Ure, L.A., in reply.

LORD LOREBURN L.C. My Lords, this case has been argued with admirable ingenuity on both sides, and in my opinion the appellants are in the right.

The question is as to the construction of a particular clause in an agreement, whether that clause imports a prohibition to work more than a particular quantity of coal, or whether it confers an option either to work or not to work on the terms of paying a certain fixed consideration. Upon this question of construction certain what I may call outside arguments have

(1) (June 18, 1811) 16 Fac. Dec. 304; affirmed (1815) 6 Pat. App. 117.
(2) (Dec. 13, 1811), 16 Fac. Coll. 419.
(3) (1813) Hume's Dec. 860.
(4) (1690) 2 Vern. 119.
(5) (1860) 30 L. J. (Ex.) 25.

been adduced. On the one hand it is said that if the clause is equivalent to a prohibition, then the tenants might be prevented from working the adjoining properties even if the coal under Mr. Forrest's land was completely exhausted. On the other hand it is said that unless this clause contains a prohibition, then Mr. Forrest got nothing as an equivalent in return for sacrificing the penny wayleave which he had before.

I really do not think that we can, in construing the words, compute what it would have been prudent on the part of these gentlemen to contract, or what we think it was reasonable for them to agree to, or how far the one party has given, upon either construction, to the other an adequate consideration. Therefore I myself cannot attach much importance to those particular contentions.

Then it was argued that unless this clause is construed to mean an option it would have been agreed to in bad faith both by Mr. Forrest and by the tenants. It is put in this way: that the parties were all acting together, both Mr. Forrest and the adjoining proprietors and the tenants, and that they intended the tenants to have an unrestricted discretion in choosing from what part of the entire field they should take coal at any particular time, and accordingly that it would have been in bad faith towards the other proprietors if Mr. Forrest on the one side and the tenants on the other entered into a contract by which the tenants would be prevented from exercising their unrestricted discretion in that respect.

Now, my Lords, if there had been any bad faith it must have been accompanied by concealment and the absence of consent. There is nothing to shew that what was done was otherwise than perfectly well known to all the proprietors; and what appears, so far as we may conjecture (for it is nothing but conjecture), seems to indicate that consideration was given to the adjoining proprietors by relieving them from the duty to pay wayleave, the other side of the consideration being that the tenants and Mr. Forrest agreed to the third clause of this agreement. Even if this transaction had been concealed, I do not at present see that it would have been any violation of the rights of the adjoining proprietors, because unquestionably the tenants

H. L. (Sc.)
1909
FORREST
v.
MERRY &
CUNING-
HAME,
LIMITED.
Lord Loreburn
L.C.

contracted for and had the right to restrict the output if they thought right. It is difficult to see how thereby they were disabled from contracting that they would restrict the output, when they had a right to restrict it. I do not wish, however, to say anything at all in regard to the lawfulness of this agreement in any proceedings, if such unfortunately may arise, between either of the parties now before your Lordships' House and any adjoining proprietor or anybody else. But your Lordships have not got any adequate materials from which you can draw the inference that it would have been dishonest on the part of the appellant Mr. Forrest and the tenants to make an agreement of prohibition, and therefore the argument that this agreement ought not to be construed as a prohibition, lest it might involve bad faith on the part of the appellant and respondents, must fall to the ground.

Looking at the contract, I do think in effect it amounts to a prohibition, and there has been no answer to the very cogent argument of the Lord Advocate that, unless that is so, the first part of this clause may just as well be obliterated from the agreement altogether. The first part of it is nugatory unless it amounts to a prohibition. I do not think that the following declaration in the least degree militates against this construction. It was reasonable to provide that a certain sum should be paid if coal in excess of a stipulated quantity should be extracted, for two reasons—in the first place because there was no restriction during five years of the term, and in the second place because it was prudent to provide for what should be done if by miscalculation or otherwise there was a breach of the agreement. For the same reason, to my mind, the fourth clause does not affect the construction of the third, and indeed to say that something should happen while you keep your contract is not to import that you have a right to break it.

While differing with the greatest possible respect from the learned judges of the First Division, I think each contract must be considered on its own merits; you have to examine the contract itself, and you do not derive very much assistance from illustrations given in other cases as to the meaning of perfectly different language. For my part I cannot help feeling that this

contract is fairly clear. It says that the tenants "will work the coal in the adjoining properties only to such an extent as to enable them to pay to the several proprietors thereof such sums of lordship as will amount to but not exceed the fixed rents." The use of the word "only" of itself imports a restriction, and I cannot find anything to qualify that primary, if not only possible, effect of the word.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD ATKINSON. My Lords, I concur.

LORD GORELL. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, in the year 1889 it is quite clear that radical alterations were made in the relations of these parties, the tenants on the one hand and the various proprietors on the other. It is a mistake in my view to suggest that the advantage was wholly upon one side or upon the other. With regard to the smaller owners, the fixed rents in each of those cases were increased, and there was also a release as regards the smaller owners of the obligation of paying for the wayleave.

The position of the proprietor of Auchinraith was one of very conspicuous power: the fields were worked in their entirety through pits upon his property, and the leverage thus created enabled him to make very strong stipulations in the contract which is now under construction. By head 3 of that contract it is perfectly clear that that power was used to a most effectual extent. The prohibition, construed in the sense of the Lord Advocate's argument, is a prohibition which is certainly very strong, and has financial results of very important consequence. Practically the old rate, the fixed rate of royalty, was converted into a royalty changeable, or on the rise, with the market price; and two-fifteenths of the market price of the coal (I presume at the pit head) is now given to the owner of the royalty, the proprietor of Auchinraith.

In these circumstances I have attended with much care to the argument which has been presented as to whether this

H. L. (Sc.) 1909

FORREST v. MERRY & CUNINGHAME, LIMITED.

Lord Shaw of Dunfermline.

prohibition should not in effect be wiped out of this agreement. But with all that care, my Lords, I am unable to accede to the argument, and I think that the learned Lord Advocate was correct in his statement that in clauses of this kind it is the last device of construction which invokes the wiping out, the complete extinction, of any portion of the clause.

My Lords, to extinguish this prohibition would be to involve considerable variation in the subsequent portion of clause 3, and indeed to read it in the sense argued would be not to read it as a prohibition, but as a permission at a price. My Lords, I cannot so read it. I think that the subsequent declaration with regard to the penny per ton, which is in the middle of clause 3, is a declaration read with perfect consistency as applicable to two situations, both of which I will mention. The first is the situation covered by the period of time between 1888 and 1893. During that period the prohibition was not to operate, and yet it is perfectly consistent with that that excavations far in excess of the fixed rental would be unrestricted, and would have to pay the penny which is here mentioned. The second is that in working out coal you may not have during the course of the working a line so perfectly accurate as to keep exactly within the point at which the royalties would reach the amount of the rent. In the ultimate accounting at the close of the year's operations it may be found that in perfect innocence an excess of the amount of royalties over the fixed rent had taken place; then the penny would be imposed. But to infer from these things that therefore there was a permission granted deliberately to override the restriction contained in the earlier portion of this clause is a mental operation of which I am not capable.

On the whole, my Lords, I prefer greatly the judgment of the learned Lord Ordinary, and I will only, adopting his words, say that in my opinion "the question comes to be one of construction of the particular clause, and I am of opinion that I cannot construe it as giving the mineral tenants a licence to work as much coal as they please from beneath the adjoining lands so long as they pay the stipulated one penny per ton. If that was the intention of the parties, I cannot understand why there was any prohibition at all. It would have been much simpler to have

said that if the tenants worked coal in the adjoining properties, then they should pay one penny per ton on the excess."

H. L. (Sc.) 1909 FORREST v. MERRY & CUNINGHAME, LIMITED.

Ordered that the interlocutor of the First Division of the Court of Session dated January 10, 1908, *be reversed; that the interlocutor of the Lord Ordinary dated November* 14, 1907, *be restored; and that the respondents do pay to the appellants their costs in this House and in the Courts below.*

Lords' Journals, July 1, 1909.

Agents for appellants: *Dixon & Hunt, for Menzies, Bruce-Low & Thomson, W.S., Edinburgh.*

Agents for respondents: *Light & Fulton, for Holmes, Mactavish, Mackillop & Co., Writers, Glasgow, and Forrester & Davidson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

INLAND REVENUE . . . . . APPELLANTS;

AND

JAMES JOHN OLIVER AND ANOTHER (TURNBULL'S TRUSTEES) . . . . . RESPONDENTS.

H. L. (Sc.) 1909 *July* 5.

Revenue—Stamp—Settlement—Alteration of Security by subsequent Deed—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *First Schedule.*

In the First Schedule to the Stamp Act, 1891, "settlement," defined as "any instrument . . . . whereby any definite and certain principal sum of money . . . . or any definite and certain amount of stock, or any security is settled or agreed to be settled in any manner whatsoever," is made liable to ad valorem stamp duty.

By an ante-nuptial contract of marriage A. bound himself in the event of his wife surviving him to pay to her an annuity of 400*l.*, and in security of said annuity A. bound himself and his heirs to infeft his wife in certain lands. The contract of marriage was impressed with a stamp duty and was adjudicated as duly stamped. Subsequently A. desired to sell the lands forming the security, and his wife agreed to consent to the sale on condition that the annuity was otherwise secured; accordingly A. in place of the said security executed a deed by which he conveyed to

H. L. (Sc.)
1909
INLAND REVENUE
v.
OLIVER.

trustees certain property upon trust for (inter alia) the payment of the annuity provided to the wife in her marriage contract and subject thereto upon trust for A. himself. The Crown claimed that the deed of trust was chargeable with an ad valorem stamp duty as being a "settlement":—

Held, affirming the decision of the First Division of the Court of Session, that the deed was not a "settlement" under the Stamp Act, 1891.

APPEAL from the First Division of the Court of Session sitting as the Court of Exchequer, Scotland. (1)

The respondents, James John Oliver and another, were the trustees of a deed of trust granted by the deceased David Turnbull in the year 1898, and the question was whether that deed was a settlement and liable to ad valorem stamp duty under the Act of 1891.

In 1875 David Turnbull, now deceased, was married to the now deceased Christian Oliver. Prior to the marriage David Turnbull and his father bound themselves conjointly and severally to pay to the said Christian Turnbull, in case she should survive the said David Turnbull, an annuity of 400*l.*, and in security of said annuity David Turnbull and his father bound themselves to infeft and seize the said Christian Oliver in an annuity of 400*l.* to be uplifted from certain lands therein specified. The contract of marriage was impressed with a stamp duty of 25*l.* 17*s.* 6*d.* and was adjudicated duly stamped. In course of time portions of the said lands were sold with the consent of Mrs. Turnbull, enough being left to afford ample security for the annuity. In 1898 David Turnbull was desirous of selling the remaining lands, and the said Christian Oliver or Turnbull agreed to release the said lands from the burden of said annuity, reserving always the personal obligation, on condition that other sufficient security was provided. Accordingly Christian Oliver or Turnbull released the remaining portions of the lands from the security, and in place of the said security David Turnbull granted in 1898 the deed of trust here in question. The deed narrated the obligation for payment of said annuity; then followed a statement of the sale of certain security of the lands and that the remainder had been conveyed to trustees for the purpose

(1) (1909) S. C. 248.

of being sold. The deed of trust then stated that Christian Oliver or Turnbull had, in consideration of the granting of the trust deed in question and that other sufficient security for said annuity was thereby provided, declared the remaining land redeemed and released of the security for said annuity constituted by the marriage contract. The deed of trust then conveyed to trustees, first, certain lands; secondly, policies of assurance; and, thirdly, a sum of 2582*l.* The trust purposes were declared to be, first, payment of expenses; secondly, the application of said sum of 2582*l.* either for the conversion of the said policies of assurance into fully paid up policies or as a fund from which the premiums might be paid; thirdly, for the payment of the balance of the income from the trust funds to the said David Turnbull during his life; fourthly, for payment out of the free income of the trust estate, or out of the capital if the income proved to be insufficient, after his death, of the said free yearly life-rent annuity of 400*l.* provided to Mrs. Turnbull by said contract of marriage; and, fifthly, subject to the foregoing purposes of trust, the said trust estate was to be held by the trustees for behoof of the said David Turnbull, his heirs, executors, and assignees whomsoever.

The trust deed was impressed with a stamp duty of 10*s.* In February, 1908, the deed of trust was submitted to the Commissioners of Inland Revenue for the purpose of having the stamp duty adjudicated. The Commissioners were of opinion that the deed was a "settlement" and that the value of the estate settled and liable to settlement duty was 8022*l.* 8*s.* This sum was made up under as follows: four policies of insurance for sums amounting in cumulo to 4950*l.*, bonus additions and policies 490*l.* 8*s.*, and residue of price of the lands 2582*l.* The Commissioners accordingly assessed upon the instrument the ad valorem duty of 20*l.* 15*s.*, and required payment of that sum less the 10*s.* already paid together with interest and penalty amounting to 19*l.* 18*s.* 1*d.*

The First Division of the Court of Session as the Court of Exchequer in Scotland on December 16, 1908, held that the deed in question was not a settlement and reversed the decision of the Commissioners. (1)

(1) (1909) S. C. 248.

H. L. (Sc.) 1909

INLAND REVENUE v. OLIVER.

May 24, 25. *Sir W. S. Robson, A.-G.*, and *Ure, L.A.* (with them *F. A. Umpherston*) (the two last of the Scottish Bar), for the appellants. The trust deed of 1898 is chargeable with ad valorem stamp duty as falling under the head "Settlement" in the First Schedule to the Stamp Act, 1891. The charge of duty is in the following terms:—"Settlement. Any instrument, whether voluntary or upon any good or valuable consideration, other than a bona fide pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever." The Crown contends that the deed is a settlement, for the trustee has substituted for the ante-nuptial contract a different security made between different parties. It imposes on the policies of assurance and the sum of money therein mentioned a trust for (1.) payment of income to the truster; (2.) payment after the death of the truster of an annuity to Mrs. Turnbull; (3.) for holding the fund for behoof of the truster, his heirs, executors, and assignees whomsoever. Mere change of security is not a new settlement. But the marriage contract related to land, while the later deed was entirely different and could not be called a mere change of investments. The whole property is given up at once to trustees to be administered by them and kept till the last. The truster subjected his own proprietary right to certain modifications, and put it out of his power during his life to deal with property, as he could have done before 1898. Successive interests and trusts and a series of limitations constitute a settlement within the meaning of the Act. *In re Campbell* (1) is exactly analogous to this case. [They also commented on the opinion of Palles C.B. in *Massereene* v. *Inland Revenue*. (2)]

Scott Dickson, D.F., and *MacRobert* (both of the Scottish Bar), for the respondents. David Turnbull and his father bound themselves by the deed of 1875 to pay the annuity. Then in 1898 there are two deeds to carry out one transaction—the deed

(1) [1902] 1 K. B. 113. (2) [1900] 2 I. R. 138, 146.

by Mrs. Turnbull discharging the lands from the annuity, and the other the trust deed securing the annuity. After the execution of that trust deed no disponee from Turnbull could challenge the right of the widow to have the policies transferred to her. If Mrs. Turnbull had got a divorce she would have been entitled to get the 400*l.* a year handed to her. A settlement implies the conferring of a beneficial interest not previously enjoyed, and the deed of 1898 is a mere substitution. It settles nothing, and its whole purpose is merely to provide security for payment of the said annuity in lieu of the lands released. It created no new beneficial interest in favour of the truster, whose right to the funds conveyed subject to the obligation created by the marriage contract remains as absolute and unfettered as it was before the deed of trust was granted. The deed is therefore not a settlement within the meaning of the Stamp Act.

Ure, L.A., in reply.

The House took time for consideration.

July 5. LORD MACNAGHTEN. My Lords, I am of opinion that the judgment under appeal is right, and that there is no foundation whatever for the claim put forward by the Commissioners of Inland Revenue.

The case is quite simple. In 1875, in anticipation of the marriage of Mr. David Turnbull with the lady who was about to become his wife, a life-rent annuity of 400*l.* was settled on the wife for life in the event of her surviving her husband. The annuity was secured by Mr. Turnbull's personal covenant and also by a charge on lands of ample value. Before the year 1898 some of the lands so charged were sold to pay off prior incumbrances, leaving abundant security for the annuity. In 1898 Mr. Turnbull proposed to sell the rest of the lands which were charged in favour of Mrs. Turnbull; and he conveyed those lands to trustees for that purpose. The trustees proceeded to sell and applied to Mrs. Turnbull to release her contingent annuity. This she agreed to do in consideration of receiving a substituted security of adequate value, in addition to Mr. Turnbull's personal obligation, which was to remain in force.

H. L. (Sc.) 1909 — INLAND REVENUE v. OLIVER. — Lord Macnaghten.

The proposed security consisted of (1.) certain houses and rights of property belonging to Mr. Turnbull, (2.) four policies of insurance on Mr. Turnbull's life for sums amounting in the aggregate to 4950*l.*, with bonus additions amounting to 490*l.* 8*s.*, and (3.) a sum of 2582*l.*, part of the proceeds of sale in the hands of the trustees, being the sum required to pay up in full the premiums on the four policies.

The transaction was duly carried out, and is evidenced by two deeds. By the first Mrs. Turnbull declared herself satisfied with the substituted security, and discharged the lands sold from the burden of her contingent annuity. By the second Mr. Turnbull conveyed the property, the subject of the substituted security, upon trust to secure Mrs. Turnbull's annuity, and subject thereto upon trust for Mr. Turnbull himself. That and nothing else was the effect of the deed, though the machinery is, perhaps, unnecessarily complicated and clogged with provisions which to an English conveyancer may seem superfluous.

This second deed is the one which the Commissioners called a settlement, and on which they founded their claim to settlement duty. There is no definition of the term "settlement" in the body of the Stamp Act. In the schedule "settlement" is explained as "any instrument . . . . whereby any definite and certain principal sum of money . . . . or any definite and certain amount of stock or any security is settled or agreed to be settled in any manner whatsoever." And so the Commissioners, finding definite and certain sums of money mentioned in the deed of substituted security, boldly claimed settlement stamp duty upon them all. The simple answer is that a mortgage or a deed of security by which the destination of the equity of redemption is not altered is not a settlement in the ordinary and proper acceptation of the term, even though the mortgage or deed of security be couched in the form of a trust, and the trust be developed or unfolded in a series of provisions which have the semblance of successive steps or stages. Subject to the charge created by the deed, Mr. Turnbull was the owner of the property after the deed was executed just as he was before, and no other person acquired any interest in the property under the instrument in question.

The claim, whether it is to be regarded as an ingenious experiment or an unhappy blunder, fails altogether, and the appeal must, I think, be dismissed with costs, and I move your Lordships accordingly.

LORDS LOREBURN L.C., JAMES OF HEREFORD, ATKINSON, and SHAW OF DUNFERMLINE concurred.

Ordered that the appeal be dismissed with costs.

Lords' Journals, July 5, 1909.

Agent for appellants: *Sir Francis C. Gore, Inland Revenue, England, for P. J. Hamilton Grierson, Inland Revenue, Scotland.*

Agents for respondents: *Marchant & Co., for Sibbald & Mackenzie, W.S., Edinburgh.*

[HOUSE OF LORDS.]

ORRELL COLLIERY COMPANY . . . . . APPELLANTS;

AND

SCHOFIELD . . . . . RESPONDENT.

Employer and Workman—Compensation—Dependant—Posthumous Illegitimate Child—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

A workman, who had admitted that he was the father of a child en ventre sa mère and had promised to marry the mother and intended to provide for the child, was killed by an accident for which his employers were liable to pay compensation. The child was born some months afterwards:—

Held, that the child was a "dependant" within the meaning of the Workmen's Compensation Act, 1906, and entitled to compensation.

Decision of the Court of Appeal, [1909] 1 K. B. 178, affirmed.

THE facts material to this appeal are stated in the head-note. The details are set out in the report of the decision of the Court of Appeal.

C. A. Russell, K.C. (*Rigby Swift* with him), for the appellants. The words of the Act, s. 13, are in themselves exclusive of any

H. L. (E.) 1909 ORRELL COLLIERY COMPANY v. SCHOFIELD.

claim on behalf of a posthumous child, and provide only for a case where the workman "leaves" a child "so dependent on his earnings," namely, "wholly or in part dependent upon the earnings of the workman at the time of his death." The mother herself was not so dependent; she was not supported in any degree by the dead man. How then can the child have a better claim than the mother? She could only have had a claim by means of a bastardy order, which can only be made on the birth of a living child and on proceedings taken. In *Main Colliery Co.* v. *Davies* (1), under the Act of 1897, the test laid down by Lord Halsbury was that of actual dependency. In *Williams* v. *Ocean Coal Co.* (2) a legitimate posthumous child was held entitled to compensation, but both the mother and child were dependants in the strict sense. The decision of this House in *Villar* v. *Gilbey* (3) is applicable only to legitimate children and is simply a rule of construction in cases of wills and settlements. *The George and Richard* (4) was an Admiralty case and analogous to *Villar* v. *Gilbey* (3), the decision being that a child en ventre was entitled to share in an ascertained fund in an action of limitation of liability. [*Queen* v. *Clarke* (5) was also cited.]

Langdon, K.C., and *G. A. Scott*, for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, I do not think we need call upon the respondent. I desire to add nothing upon the point of legitimacy or upon the question arising in regard to posthumous children. I agree with the Court of Appeal.

I will only say this much in regard to the language in the statute which requires that a person shall be dependent on the earnings of the deceased workman at the time of his death. In nearly all cases the practical question will be that which was put by Mr. Russell, namely, whether or not assistance of one kind or another has been given out of the earnings of the deceased workman, but it may be that a person so situated that he might reasonably count upon assistance from those earnings, and

(1) [1900] A. C. 358.
(2) [1907] 2 K. B. 422.
(3) [1907] A. C. 139.
(4) (1871) L. R. 3 A. & E. 466.
(5) [1906] 2 I. R. 135.

probably would need it, ought in the circumstances of the case to be included among the dependants referred to in the statute. I do not think it is necessary to add anything further to the judgment of the Court of Appeal.

LORD ASHBOURNE. My Lords, I entirely concur with what has been said by the Lord Chancellor, and also with the judgment of the Court of Appeal.

LORDS JAMES OF HEREFORD, GORELL, and SHAW OF DUNFERMLINE agreed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 14, 1909.

Solicitors: *W. P. Ellen, for Peace & Darlington, Liverpool; Burn & Berridge, for James Wilson, Wigan.*

[HOUSE OF LORDS.]

ANSLOW . . . . . APPELLANT;

AND

CANNOCK CHASE COLLIERY COMPANY, LIMITED . . . . . RESPONDENTS.

Employer and Workman—Compensation — Basis of Calculation—"Average Weekly Earnings"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., ss.* 1, 2.

In estimating for the purpose of compensation under the Workmen's Compensation Act, 1906, the amount of a workman's "average weekly earnings" the true test is what were his earnings in a normal week, regard being had to the known and recognized incidents of the employment. If work was discontinuous, that is an element which must be taken into account.

Decision of the Court of Appeal, [1909] 1 K. B. 352, affirmed.

ANSLOW, the appellant, was totally incapacitated by an injury in the service of the respondents. In the employment the

H. L. (E.) 1909

ANSLOW v. CANNOCK CHASE COLLIERY COMPANY, LIMITED.

appellant worked for so many days as made up thirty-three weeks. On the days which made up the nineteen remaining weeks of the twelve months he had not worked at all. There was no work for him during fourteen of those weeks, and during two of them there were public holidays and wakes. During two of the remaining three weeks the appellant was ill, and during the third he took a holiday.

In estimating the "average weekly earnings" of the appellant for the purpose of compensation the learned county court judge divided the total amount of earnings (68*l.* odd) by 33, and from the result (2*l.* 1*s.* 4*d.*) deducted the fraction $\frac{6}{52}$, leaving 1*l.* 8*s.* 2*d.* as the "average weekly earnings." He found as a fact that the fourteen weeks of stoppage and the two weeks of public holidays were normal and recognized incidents of the employment.

This decision was affirmed by the Court of Appeal (Cozens-Hardy M.R., Fletcher Moulton and Farwell L.JJ.).

Isaacs, K.C., and *Hugo Young, K.C.* (*Graham Milward* with them), for the appellant. The scale of compensation is laid down in the First Schedule and is based on the wage-earning capacity of the workman. The words in s. 2 (*a*) are—"average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which a workman was being remunerated." These words are not found in the Act of 1897, which in the First Schedule, s. 1 (*b*), makes "the previous twelve months" the standard. The decision of the Court of Appeal in *Bailey* v. *Kenworthy* (1) supports the appellant's contention. Fletcher Moulton L.J. there said: "The fact that a workman does not work during any week, and is, therefore, not remunerated during that week, does not in my opinion affect the rate of his remuneration." That rate in the present case was over 2*l.* a week. The construction of the Court below might produce unjust and inequitable results as between the same class of men in adjoining collieries and even the same colliery. One colliery might work all the year, and another, like this, might suspend

(1) [1908] 1 K. B. 441, 461, 466.

work during a period of every year. Again, in the respondents' colliery, a man injured on June 30, for example, at the end of a full period of work would receive far more than another who met with an accident in October. It is agreed on both sides that no deduction is to be made for voluntary absences, and thus a premium is offered to idleness.

C. A. Russell, K.C., and *E. W. Cave*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, in this case I agree with the conclusion arrived at by the Court of Appeal and by the learned county court judge in his extremely careful and able judgment.

The question is in regard to the way in which the average weekly earnings of a workman shall be computed in a case in which a normal and recognized incident of his work was fourteen weeks' stoppage and two weeks of general holidays during the year.

The object of the Act broadly stated is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident. If he takes a holiday and forfeits his wages for a month, then that does not interfere with what he can earn. It is only that for a month he did not choose to earn. So, too, if there be a casualty accidentally stopping the work. But if it is part of the employment to stop for a month in each year, then he cannot earn wages in that time in that employment, and his capacity to earn is less, over the year.

I agree with what the learned Master of the Rolls says in his judgment when he uses the following language: "In my opinion the true test is this: What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked."

I therefore move your Lordships that the appeal be dismissed with costs.

H. L. (E.) 1909

ANSLOW v. CANNOCK CHASE COLLIERY COMPANY, LIMITED.

LORDS ASHBOURNE, GORELL, and SHAW OF DUNFERMLINE concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 17, 1909.

Solicitors: *James Mitchell, for R. A. Willcock & Taylor, Wolverhampton; Beale & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1909

May 20.

BROOK . . . . . APPELLANTS;

AND

MELTHAM URBAN DISTRICT COUNCIL . RESPONDENTS.

Local Government—Sewers—Facilities for carrying off Liquids from Factories —Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

The facilities required by s. 7 of the Rivers Pollution Prevention Act, 1876, to be given for carrying liquids from factories or manufacturing processes into sewers under the control of a local authority cannot be enforced where, though the pipes are capable of carrying the liquids, the works for purification are not sufficient to deal with the liquids in addition to the sewage within the district. The word "sewers" in the second proviso of s. 7 includes not merely the pipes, but the works for purification of the sewage.

Decision of the Court of Appeal, [1908] 2 K. B. 780, affirmed.

THE question raised by this appeal was whether the appellants' firm of Jonas Brook & Brothers, Limited, could require the Meltham Urban District Council to give facilities for carrying 65,000 gallons of liquids proceeding from the appellants' mills into the sewers of the respondents. The learned county court judge found that, though the pipes might be capable of carrying the liquids, the works for the treatment thereof were not sufficient to purify 65,000 gallons a day in addition to the domestic sewage, and he therefore entered judgment for the respondents in an action brought by the appellants to enforce

the facilities under s. 7 of the Rivers Pollution Prevention Act, 1876. This decision was reversed by the King's Bench Division (Channell and Sutton JJ.) (1) in view of two cases, *Guthrie & Co.* v. *Brechin* (2) and *Eastwood Brothers* v. *Honley Urban Council.* (3) That decision was reversed and the decision of the county court judge restored by the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.). Hence this appeal.

Danckwerts, *K.C.*, and *T. E. Ellison*, for the appellants. The obligation to give the facilities is imperative, not discretionary. The statute says "Every sanitary or other local authority having sewers under their control shall give"—not "may give"—"facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers: Provided . . . . that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district." The word "sewers" in the first part of s. 7 clearly means only the pipes and applies only to carrying capacity. Why should the same word in the above proviso mean something more? There are no words implying a reference to the outfall or purification works. The appellants are therefore entitled to the facilities for which they ask. The only question to consider is the capacity of the pipes to carry off the appellants' effluents in addition to the ordinary sewage of the district, and it has been admitted that they are adequate to this purpose. The outfall and purification works are not sewers; the treatment and preparation of sewage matter are wholly independent of the conveyance to be effected by the sewers. This is the effect of the decision of the Court of Session in *Guthrie & Co.* v. *Brechin* (2), where Lord President Inglis held that sewers were sewers and nothing else and distinguished between sewers and ancillary works. A like distinction was drawn by Kindersley V.-C. in *Sutton* v. *Norwich Corporation.* (4) The natural and restrictive application of the term was adopted in *King's College*,

(1) [1908] 2 K. B. 341.
(2) (1888) 15 R. 385.
(3) [1901] 1 Ch. 645.
(4) (1858) 27 L. J. (Ch.) 739.

H. L. (E.) 1909 BROOK v. MELTHAM URBAN COUNCIL.

Cambridge v. *Uxbridge Rural Council* (1), and there was a like limitation of the words "drain or watercourse" in *Croft* v. *Rickmansworth Highway Board.* (2) The functions of the local authority under the Rivers Pollution Prevention Act, 1876, are described in *Pasmore* v. *Oswaldtwistle Urban Council.* (3) [They also cited *Croysdale* v. *Sunbury-on-Thames Urban Council* (4) and *Jary* v. *Barnsley Corporation.* (5)]

Scott Fox, K.C., and *Lowenthal*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, in my opinion the Court of Appeal came to the right conclusion in this case.

The 7th section of the Rivers Pollution Prevention Act of 1876 gives to manufacturers certain rights of carrying within their district the liquids proceeding from their factories or manufacturing processes into the sewers. It is by way of grace and of favour. I need not repeat what has been so well said by Channell J. and by Fletcher Moulton L.J. upon that subject.

The right, whatever it is, is qualified by two provisoes, and Mr. Danckwerts very legitimately tried to steer his argument between these two provisoes. Looking at the second proviso, my own view is that this is a case in which "the sewers of such authority are only sufficient for the requirements of their district." The word "sewer" does not necessarily bear the same meaning as in the Public Health Act, 1875, whatever the meaning in that Act may be. I think in the present case it includes the works which are a part of the system through which the sewage flows to the river where it ultimately escapes. That will be sufficient to justify the decision of the Court of Appeal. It is unnecessary to say anything in regard to the meaning of the first proviso beyond this, that a strong argument might perfectly well have been addressed to the House in reference to that proviso also.

LORDS MACNAGHTEN and GORELL concurred.

LORD SHAW OF DUNFERMLINE. My Lords, I agree, but in doing so I should like to refer to the Scotch case of *Guthrie & Co.*

(1) [1901] 2 Ch. 768.
(2) (1888) 39 Ch. D. 272.
(3) [1898] A. C. 387.
(4) [1898] 2 Ch. 515.
(5) (1907) 5 L. G. R. 1145.

v. *Brechin* (1) which has been cited. In my opinion the highest deference is rightly paid to any judgment by that very great and distinguished judge the late Lord President Inglis, but I dissent from the view which seems to have been entertained by Channell J., that that judgment in the Scotch Court was in any way a disturbing factor in the present case. I cannot better express my opinion upon the merits of *Guthrie's Case* (1) and its relation to the present case than by repeating the judgment of the learned county court judge in these proceedings. He says: "The judge" (referring to Lord President Inglis) "there speaks of pipes; but there he is distinguishing the pipes from the land and the sewage farm to which the sewage was carried. So far as appears there was no piping, there was nothing artificial, but the pipes referred to there were pipes which carried sewage on to a farm, and then it was disposed of by course of nature; there were no artificial works."

That case, so far as fact is concerned, shews the broad distinction from the present case, in which you have a series of artificial works the entry to which is no doubt the pipe which drains through the locality, but the exit from which is the effluent pipe; and it is only when the sewage reaches the effluent pipe that it becomes innocuous in the sense of the statute; and the statutory duty of disposal of the sewage is not performed until the effluent pipe is reached and the discharge therefrom in that innocuous condition or in innocuous circumstances occurs.

My Lords, but for that Scotch decision, which I think has been misapprehended and so treated as a disturbing element, I presume that the learned judges in the Courts below would have been unanimous in their judgment in the sense adopted in the Court of Appeal. I think the decision arrived at by the learned Lords Justices was right.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 20, 1909.

Solicitors: *Van Sandau & Co., for Mills & Co., Huddersfield; Rawle, Johnstone & Co., for Learoyd & Co., Huddersfield.*

(1) 15 R. 385.

[HOUSE OF LORDS.]

H. L. (E.) 1909 *May* 21.

QUIN & AXTENS, LIMITED AND OTHERS . APPELLANTS;

AND

SALMON . . . . . RESPONDENT.

Company — Directors — Articles of Association — Construction — Vesting of Management in Directors—Control of Management by Company in General Meeting.

By the 75th article of association of a company the business of the company was to be managed by the directors, who might exercise all the powers of the company "subject to such regulations (being not inconsistent with the provisions of the articles) as may be prescribed by the company in general meeting." By the 80th article no resolution of a meeting of the directors having for its object the acquisition or letting of premises should be valid unless notice should have been given to each of the managing directors A. and B. and neither of them should have dissented therefrom.

The directors passed resolutions with the object of acquiring and letting premises, from which B. duly dissented, and resolutions to the same effect were passed at an extraordinary general meeting of the company by a simple majority of the shareholders:—

Held, that upon the true construction of the articles the resolutions of the company were inconsistent with the provisions of the articles and that the company must be restrained from acting upon them.

Decision of the Court of Appeal, [1909] 1 Ch. 311, affirmed.

THE circumstances material to this appeal are stated in the head-note and the details are fully set out in the report of the decision of the Court of Appeal.

Upjohn, K.C., and *Cave*, K.C. (*Vernon* with them), for the appellants. Article 75 does not delegate to the directors the management of the business of the company to the exclusion of the company's control in general meeting. The directors' powers were subject to the articles and also to "such regulations . . . . as may be prescribed by the company in general meeting." The word "regulations" is used in marked distinction from "articles," though in some cases the words have been treated as equivalent and interchangeable. A resolution passed at an extraordinary general meeting is of higher authority than a resolution of

directors. The resolutions were not inconsistent with the articles when properly construed. The veto of Axtens and of Salmon was effective only upon resolutions of the directors, and not upon those of the company. *Marshall's Valve Gear Co.* v. *Manning, Wardle & Co.* (1) is precisely in point, and Neville J. held that a resolution passed by a majority of shareholders overruled the action of the directors. *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame* (2) was a different case and depended on the difference between an ordinary and an extraordinary resolution of shareholders, the latter requiring a majority of three-fourths. The distinction between the acts of the company and those of individual directors drawn in *Gramophone and Typewriter, Ld.* v. *Stanley* (3) is in favour of the appellants. It is the company, not the individual corporator, which carries on the business. Moreover, the proposal dissented from did not relate to the "business" of the company, which is defined in the memorandum to be that of "drapers and furnishing and general warehousemen in all its branches." [They also referred to *Isle of Wight Ry. Co.* v. *Tahourdin* (4), a case under the Companies Clauses Act, 1845.]

Jessel, K.C., *Daldy*, and *Nutter*, for the respondents, were not heard.

Lord Loreburn L.C. My Lords, I do not see any solid ground for complaint against the judgment of the Court of Appeal.

The bargain made between the shareholders is contained in articles 75 and 80 of the articles of association, and it amounts for the purpose in hand to this, that the directors should manage the business; and the company, therefore, are not to manage the business unless there is provision to that effect. Further the directors cannot manage it in a particular way—that is to say, they cannot do certain things if Mr. Salmon or Mr. Axtens objects. Now I cannot agree with Mr. Upjohn in his contention that the failure of the directors upon the objection of Mr. Salmon to grant these leases of itself remitted the matter to the discretion

(1) [1909] 1 Ch. 267.
(2) [1906] 2 Ch. 34.
(3) [1908] 2 K. B. at p. 105.
(4) (1883) 25 Ch. D. 320.

H. L. (E.) 1909

QUIN & AXTENS, LIMITED v. SALMON.

Lord Loreburn L.C.

of the company in general meeting. They could still manage the business, but not altogether in the way they desired.

Next, in regard to the second point I think it is really too clear for argument that the business in question was business within the meaning of the 75th article.

The only question of substance to my mind is the third contention of Mr. Upjohn, when he said that the word "regulations" as employed in the 75th article includes at all events, if it is not equivalent to, directions whether general or particular as to the transaction of the business of the company. Now it may be a question for argument, but for my own part I should require a great deal of argument to satisfy me that the word "regulations" in this article does not mean the same thing as articles, having regard to the language of the first of these articles of association. (1) But, whether that be so or not, it seems to me that the regulations or resolutions which have been passed are of themselves inconsistent with the provisions of these articles, and therefore this appeal fails, and I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. I think the judgment of the Court of Appeal is perfectly right.

LORD JAMES OF HEREFORD and LORD SHAW OF DUNFERMLINE concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 21, 1909.

Solicitors: *Redfern, Hunt & Co.; Bartlett & Gluckstein.*

(1) Which runs as follows: "The regulations contained in Table A of the First Schedule to the Companies Act, 1862, shall not apply to this company, but the following shall be the regulations of the company."

[HOUSE OF LORDS.]

MIDLAND RAILWAY COMPANY . . . . APPELLANTS; AND GREAT WESTERN RAILWAY COMPANY . RESPONDENTS.

H. L. (E.) 1909 July 9.

Railway Company—Powers exercisable for Limited Period—Expiration of Time—Company in lawful Possession of Land—Power to construct Railway.

A special Railway Act empowered the Great Western Railway Company to make railways and construct junctions between their line and the railways of the Midland Company and provided that if the junctions were not completed within five years the powers granted should cease. The Great Western Company made the railways but had not completed the junctions before the end of the five years :—

Held, that there was nothing in the Act to prevent the Great Western Company from completing the junctions by virtue of their ownership of their own land and a licence to use the land of the Midland Company.

The decision of the Court of Appeal, [1908] 2 Ch. 644, affirmed.

THE circumstances material to the point reported are stated concisely in the head-note and in detail in the reports of the decisions below.

Upjohn, K.C., and *Sargant*, for the appellants, contended that there was no power to complete the junctions after the expiration of the five years.

Sir A. Cripps, K.C., *Rowden*, K.C., and *Howard Wright*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, the point arising from the fact that the powers of the Great Western Railway Company under their Act of 1896 expired in five years has, if I may say so with the utmost respect, no substance whatever. By the time those powers expired the company had become possessors of all the land that was needed, and also of a licence, which, taken together, were sufficient to enable them to complete the works that were prescribed by the Act. I cannot understand the distinction sought to be drawn in argument between the position of an easement in this connection and the position of the freehold.

H. L. (E.) 1909 MIDLAND RAILWAY v. GREAT WESTERN RAILWAY.

In completing the junctions, even after the five years, the company were not resorting to the powers of the Act at all. What they were doing was to exercise their right to use their own land and their own licence in order to carry out their business as a railway company.

I move that the order appealed from be affirmed.

LORDS ASHBOURNE, ATKINSON, GORELL, and SHAW OF DUNFERMLINE concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 9, 1909.

Solicitors: *Beale & Co.; R. R. Nelson.*

[HOUSE OF LORDS.]

H. L. (I.) 1909 *July* 12.

MURPHY . . . . . APPELLANT;

AND

DEICHLER AND OTHERS . . . . . RESPONDENTS.

Will—Power of Appointment—Foreign Donee of Power domiciled abroad—Exercise of Power—Power exercised in accordance with English Law but not with Law of Domicil.

Where an English power of appointment by will is exercised by a will executed in English form, though the appointor be domiciled abroad and the will be not validly executed according to the law of domicil, the document may be admitted to probate as a will for the purpose of the appointment, though not admissible for other purposes. This practice has been too long observed to be now disturbed.

JOHN CHARTERS, of Craigowen, in the county of Down, by will in 1868 charged property with the sum of 13,000*l.* in favour of his daughter Ellen and after her death in favour of her issue in such shares and subject to such provisions as she should by deed or will duly appoint, and in default of appointment in favour of all her children in equal shares. By a codicil in 1873

the testator bequeathed to his daughter Ellen 4000*l.* in addition to the 13,000*l.* and on the same conditions.

Ellen Charters married a German subject named Siebert and became a naturalized German subject with a German domicil. In 1903, at Homburg, she exercised her power of appointment in favour of her children by a will duly attested according to the law of England and Ireland, but invalid by German law, and in 1904, at Kiel, she varied the appointment by a codicil valid according to the law of England and Ireland, but invalid according to German law.

Her executors and trustees, the present respondents, brought an action to establish the alleged will and codicil against the appellant, who had lodged a caveat. The Court of Appeal in Ireland (Sir Samuel Walker L.C., Fitzgibbon and Holmes L.JJ.) affirmed the judgment of Gibson J. (who had tried the action) and the decision of the King's Bench Division (Lord O'Brien C.J., Johnson and Wright JJ.) in accordance with the practice which had existed for many years, and made an order that the executors and trustees should be at liberty to apply for a grant of letters of administration with the alleged will and codicil annexed, limited to the estate and interest of the testatrix in the property over which she had a power of appointment.

Hence this appeal.

Sir Edward Carson, K.C., and *R. F. Bayford* (*J. H. Watts* with them), for the appellant. The power of appointment was given by an English will and was exercisable by will. The natural construction is that the instrument by which the power is exercised should be really a will, valid according to the law of the testator's domicil. Here it is admitted that by German law the instrument was not a will at all. The question appears never to have come before this House, though there are decisions of the Judicial Committee and of other tribunals which in the main are adverse to the appellant. The two Privy Council cases *Tatnall* v. *Hankey* (1) and *Barnes* v. *Vincent* (2) are somewhat ambiguous and do not directly support the proposition that a power can be effectually exercised by a will inoperative

(1) (1838) 2 Moo. P. C. 342.

(2) (1846) 5 Moo. P. C. 201.

H. L. (I.) 1909 MURPHY v. DEICHLER.

in the testator's domicil. The question was whether the instrument should be sent to the Ecclesiastical Court to be proved. No Court would look at the will until it was proved. It was for the Court of Chancery to consider the effect of the will. The subject was considered by Sir J. P. Wilde in *In the Goods of Hallyburton* (1), where a will made by a married woman but not valid by the law of Scotland, her domicil, was held to effect a valid disposition of property in execution of a power of appointment in an English will. Sir James Wilde followed, with reluctance, what he considered to be the principle of *Tatnall* v. *Hankey* (2) and *Barnes* v. *Vincent* (3) adopted by Sir Cresswell Cresswell in *In the Goods of Alexander* (4), where he modified his own opinion in *Crookenden* v. *Fuller*. (5) In *D'Huart* v. *Harkness* (6) Lord Romilly held that a power was properly exercised by an unattested will valid by the law of the testator's domicil. Jeune P., apparently with reluctance, followed *In the Goods of Alexander* (4) in *In the Goods of Huber*. (7) The law was interpreted in the same sense by Stirling J. in *In re Price*. (8) This House is not bound by these authorities, and the views of Sir J. P. Wilde and Jeune P. are preferable and more logical.

Denis S. Henry, K.C., and *J. A. Weir Johnston* (both of the Irish Bar) were not heard.

LORD LOREBURN L.C. My Lords, the learned counsel for the appellant have urged all the arguments which could have been urged in support of the appeal, and I think they have perhaps shewn that seventy years ago their arguments might possibly have prevailed. But it has been established, I think not unreasonably, that it is a proper exercise of an English power of appointment by will if it be exercised by a will in the English form, even though the person appointing be domiciled abroad and the will be not validly executed according to the law of domicil. The document may be admitted to probate as a will

(1) (1866) L. R. 1 P. & M. 90.
(2) 2 Moo. P. C. 342.
(3) 5 Moo. P. C. 201.
(4) (1860) 29 L. J. (P. & M.) 93.
(5) (1859) 1 Sw. & Tr. 441.
(6) (1865) 34 Beav. 324.
(7) [1896] P. 209.
(8) [1900] 1 Ch. 442.

for the purpose of the appointment, though it may not be admissible for other purposes.

I think this case falls within the rule that it is not necessary or advisable to disturb a fixed practice which has been long observed in regard to the disposition of property, even though it may have been disapproved at times by individual judges, where no real point of principle has been violated.

Under these circumstances I think your Lordships will be well advised to adhere to the decision of the Court of Appeal in Ireland.

LORDS ASHBOURNE, ATKINSON, and SHAW OF DUNFERMLINE concurred.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed with costs.

Lords' Journals, July 12, 1909.

Solicitors: *Kenneth Brown & Co., for E. B. Wannop, Littlehampton; A. F. Douglas, for H. C. Weir, Belfast.*

[HOUSE OF LORDS.]

H. L. (E.) 1909 *July* 19.

ABRAM LYLE & SONS . . . . . APPELLANTS;

AND

OWNERS OF STEAMSHIP SCHWAN . . . RESPONDENTS.

THE SCHWAN.

Admiralty—Ship—Bill of Lading—Exceptions and Conditions—Damage to Cargo—Seaworthiness—Negligence of Shipowners.

The decision of the Court of Appeal, [1909] P. 93, reversed upon the ground that the *Schwan* was as a matter of fact not seaworthy owing to a defect in a three-way cock which allowed the sea to run into the hold, and that the shipowners' engineer had as a matter of fact not exercised reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances.

The decision of Bargrave Deane J., [1908] P. 356, restored upon the above ground.

THIS appeal turned upon questions of fact. The story is plainly told in the judgment of Lord Gorell.

June 24, 25. *Sir Robert Finlay, K.C.* (*Laing, K.C.*, and *Balloch* with him), for the appellants.

Scrutton, K.C., and *Bateson*, for the respondents.

The House took time for consideration.

July 19. LORD ATKINSON. My Lords, in this case the plaintiffs sued to recover damages in respect of a cargo of sugar shipped on board the steamship *Schwan* to be carried from Bremen to London. The greater part of the cargo had been seriously injured, if not entirely destroyed, in transit, by reason of the main hold of the ship having been flooded with sea water to the depth of about four feet.

There is no controversy as to the extent of the damage done to the sugar, nor as to the cause of it, and the only question for decision is whether or not the shipowners are protected by the tenth clause of the bill of lading, which again resolves itself in

effect into the questions—(1.) Was the ship seaworthy when loaded, that is reasonably fit to perform the service which the shipowner engaged her to perform, namely, to carry the goods to their destination; and (2.), if not seaworthy in fact, had the owners and their agents proved that they had discharged the duty imposed upon them by this article—that is, had they "exercised reasonable care and diligence" to make her seaworthy? It was not contended that if she was not seaworthy in fact the burden of proving the exercise of this care and diligence did not rest upon the shipowners.

The ship was furnished with bilge pipes running from each of the holds, by means of which the water in the bilge could, by a suction pump worked by a donkey engine situated in the engine room, be drawn up and discharged into the sea through a pipe opening under water. This pipe was furnished with a sea cock, but this cock was always open during pumping operations and was not necessarily closed even at sea.

On each of these bilge pipes was placed a non-return valve, designed to permit the water to pass freely from the hold during pumping operations, but to prevent its return to the hold through regurgitation. This was its primary purpose. Incidentally, the valve, if closely shut, would prevent any sea water which might enter from the sea into the discharge pipe from leaking into the hold. It is clear, however, upon the evidence, especially that of James Blackett, one of the defendants' witnesses, that at all events in new ships, such as the *Schwan* was, non-return valves of this kind are liable to get choked by chips of wood, tow, and such other substances passing through them. When this occurs the valve does not shut down closely, and water approaching it from the sea can readily leak through it into the hold. This is, in fact, precisely what occurred in the present case. It almost necessarily follows that if the water was left free to flow from the sea down through the discharge pipes, and that these non-return valves were the only appliances other than the sea cocks provided to prevent it from flowing into the hold, the ship would be unseaworthy, inasmuch as her safety or that of her cargo would entirely depend on the continuously effective action of a valve, or of valves, which might at any moment go wrong.

H. L. (E.) 1909 THE SCHWAN. Lord Atkinson.

It is contended, however, on the part of the respondents, that an additional and effective precaution against all danger of this kind was provided by a certain cock, called a "three-way cock with a two-way inlet," fitted on the pipe leading from the non-return valves to the sea. This cock is described by the trial judge as a pipe with three junctions in it, one junction opening to the sea to take in sea water, one opening to the bilges, and one to the suction pump, the three openings being in the same horizontal plane. The cock was made in Germany, where the ship was built by, it is not disputed, competent builders. It differed from cocks made in England for similar purposes in two respects. First, in the latter only two of the openings are in the same horizontal plane, the third being vertical; and second, a most vital matter, while the plug of the English manufactured cock is so constructed that, no matter in what direction or to what extent it may be turned, it can never open more than two ways at once, the plug in this cock is so constructed that although, if turned home in either one or other of the directions in which it can be turned, it only opens two ways at once, yet, if not turned home, but left in a somewhat intermediate position between the two extremes, it opens three ways at once, and, as far as it is concerned, leaves a free passage for the water to flow from the sea down the pipes to the non-return valves. It is not disputed that it was in this way the hold got flooded in the present case.

The plug, either through negligence, carelessness, or ignorance, or by design, was left half turned, the sea water passed down freely to the non-return valve, which was choked by a piece of tow, or some such substance, and the water leaked through this valve into the hold. One would have supposed that on the discovery of the flooding the cause of it would have at once suggested itself to any one acquainted with the structure of the cock. The fact that it did not suggest itself to any member of the crew, or to any of the persons who inspected the vessel, until she was on her return voyage from London to Bremen is the strongest evidence that they were all ignorant of the peculiar structure of the cock and the danger that might result from its use. The cock was fixed beneath the floor of the engine room,

the top of the plug being flush with the floor and visible from it. The plug was turned by a box spanner. Two grooves were cut upon the top of this plug, indicating the direction in which it should be turned, and shewing when it was turned home. It was not disputed, however, that the internal construction of the cock could not be ascertained by inspecting its exterior, and that no indication whatever was given by anything external of the position, or action, of its internal parts when the plug was left in an intermediate position, or any position closely approaching thereto.

Furthermore, the cock did not conform to requirements prescribed by the English Lloyd's rules, or the rules of the Bureau Veritas, or, it was contended, by those of the Germanischer Lloyd. These rules are respectively as follows: The English Lloyd's rules provide that "The arrangement of pumps, bilge injections, suction and delivery pipes is to be such as will not permit of water being run from the sea into the vessel by an act of carelessness or neglect." Article 34, section 10, of the rules of the Bureau Veritas provides (inter alia) that "Valve chests, cocks and pipe connections must in all cases be so arranged that water from the sea cannot accidentally be run into the ship."

The Germanischer Lloyd rules provide as follows: Rule No. 2: "All sea cocks and when practicable all other valves and cocks must be easily accessible. They are to be placed above the engine room and stokehold floors and must be so arranged that no doubt can arise as to whether they are open or shut." And rule 7: "Wherever there is a possibility of the admission of water into a vessel's hold the pipes leading thereto must be fitted each with two valves working independently of each other, so that the flooding of a compartment, even when the valves are carelessly handled, is rendered impossible."

The chief engineer Meyer stated that he was himself well acquainted with the structure and action of this cock. The judge at the trial disbelieved him. In my view the judge's conclusion on this point was amply justified by the evidence of the captain, of Herr Motting, and most of all by the conduct of the engineer himself.

The captain's evidence is clear and distinct upon the point.

H. L. (E.) 1909 THE SCHWAN. Lord Atkinson.

At pages 54-55 of the record the following passages of his evidence occur:—"(Q.) I suggest to you that neither you nor the chief engineer knew anything about this three-way cock until Mr. Steele found it out for you. (A.) Not before, no. (Q.) Are you sure Mr. Steele ever was on the ship before January or February? (A.) No, I think he was there before. (Q.) Just think. Try and collect yourself, and remember whether Mr. Steele ever came on the scene at all until your next voyage in January or February. (A.) No, I think he was on board in November, I am not quite sure. (Q.) Before I leave it, again I ask you if you knew that this three-way cock of yours was capable of being left by mistake, or by design, so as to admit water into your bilge valve suction box. (A.) Not before Mr. Steele pointed it out. Mr. Winstanley pointed it out to me. (Q.) We shall perhaps see later on, but do you suggest you knew—and just be careful how you answer—that you had a fitting on board the ship that could be so left as to let the water down into your bilges of No. 2 hold? (A.) No. (Q.) You did not know? (A.) No, not when the ship was built, not before this gentleman told me."

The passages of the evidence of Herr Motting found at pages 61 and 62 of the record lead irresistibly to the same conclusion. And, indeed, that gentleman for himself says that when he inspected the ship he never saw the cock opened, that the piping arrangements on the plans tell nothing of the structure of this cock, and that "he thought" and "expected" when "it was put into the ship it would open two ways at once, and not three ways at once." The learned judges in the Court of Appeal were apparently of opinion that this cock was, owing to its mechanism, a dangerous cock, that is, a fitting calculated to endanger in its use the ship or cargo. It was used frequently. The chief engineer stated that he used the pump every four hours on his voyage from Bremen to London, and on each of these occasions the cock must have been used. And it certainly would appear to me that a due regard for the safety of the ship and cargo would have imperatively demanded that every member of the crew likely to use this cock, or interfere with it, should, before the voyage commenced, have been fully instructed as to its proper use and fully informed as to the danger to be avoided;

since the best machinery may become a source of danger if placed under the control of the ignorant or unskilled, and the best equipped ship may become unseaworthy if her crew are unacquainted with the nature, structure, and proper use of the appliances with which she is furnished.

In my view it is therefore clear that this ship, equipped as she was, and manned by the crew she carried, was, at the time she was loaded, in fact unseaworthy.

It was urged, however, by Mr. Scrutton on behalf of the respondents that, even if this be so, the respondents are protected under clause 10 of the bill of lading, because they and their agents had exercised "reasonable care and diligence" in fulfilment of their obligation to provide a seaworthy ship, inasmuch as (1.) they had this ship built by a first-class builder, (2.) had her fitted with a kind of cock in common use in Germany for ships of her kind and class, (3.) had sent their own engineer, Meyer, over to superintend the building of her, and (4.) caused her to be inspected by the proper German official.

There appears to be no question as to the character of the builders, but as to the second ground relied upon, though a cock with three openings in the same horizontal plane such as this may be the design of cock commonly used in German-built vessels, there is no proof whatever that a cock which, if the plug be placed in an intermediate position, opens three ways at once, and places the non-return valve, if the sea cock be open, in direct communication with the sea, is commonly used. Indeed the evidence of Herr Motting, the respondents' surveyor, at page 61 suggests, if it does not prove, the contrary. It would be strange indeed if it were otherwise, seeing that such a cock does not conform to the requirements of the rules above mentioned.

Mr. P. Winstanley, a witness examined for the respondents, who inspected the ship in London, but to whom the real cause for the flooding never occurred, put the matter as to the marking on the top of the plug quite plainly in the following questions and answers to be found at page 81 of the record :—"(Q.) Would you have passed it as a Bureau Veritas surveyor, if you had known it? (A.) You mean in building the ship? (Q.) Yes. (A.) I

H. L. (E.) 1909 THE SCHWAN. Lord Atkinson.

do not think so. (Q.) It is in the teeth of your own rules, is it not? (A.) I do not know that it is material, but our rules would require a second valve, like the one I saw produced. (Q.) At any rate, your rules do not contemplate a three-way cock which lets the water down into the bilges without your knowing it? (A.) Well, that is hardly this case, is it? It is that the marks shew that it is so. (Q.) But the marks do not shew, do they, that if you do not adjust them properly the water will find its way down? (A.) You would have to know beforehand. Once you know, it is perfectly clear according to the marks."

There is no evidence whatever that any person connected with the respondents, other than Meyer, the engineer, saw the inside of this cock, was informed of the nature of its mechanism, or knew anything whatever of the danger involved in its use, or that any person other than Meyer ever took any pains to obtain information on any of these points. But Meyer's story of his knowledge of the working of the cock was inconsistent with his conduct and was, in my opinion, rightly disbelieved. He could not have tested the cock properly or he must have discovered its defects. No officer connected with the Germanischer Lloyd was examined. Neither was any engineer or inspector unconnected with the respondents who inspected the ship before the flooding occurred examined as a witness.

I concur with Bargrave Deane J. in thinking that Meyer, the agent of the respondents, designated by them to superintend, on their behalf, the building of this ship, failed to exercise "reasonable skill and care in connection with the ship, her tackle and appliances," and that the accident is due to his neglect. Meyer's principals are, I think, responsible for this negligence. But Meyer's default did not, in my view, at all consist, as the Court of Appeal apparently considered, in failing to use properly, or failing to cause those under him to use properly, a particular piece of mechanism with the structure and action of which he was well acquainted, but in his failing to inform himself when he had ample opportunity, before the ship was loaded, what the nature of that mechanism was, and what the danger involved in its use, and in his failing to insist upon its removal from the ship. On the contrary, she was permitted to go to sea

with an equipment dangerous in itself, but rendered doubly dangerous by reason of his ignorance of its operation.

I am therefore of opinion that the decision appealed from was wrong and should be reversed, that the judgment of Bargrave Deane J. should be restored, and that this appeal should be allowed with costs.

Lord Macnaghten. My Lords, I agree with the opinion which has just been delivered by my noble and learned friend.

Lord James of Hereford. My Lords, I concur.

Lord Collins. My Lords, I have had an opportunity of reading in print the opinion about to be delivered by my noble and learned friend Lord Gorell. I entirely agree with it and have nothing to add.

Lord Gorell. My Lords, the question in this case is whether the appellants are entitled to recover from the respondents for the loss the appellants have sustained by reason of damage to certain bags of sugar of which they were the owners carried by the steamship *Schwan* from Bremen to London in November, 1907, under bills of lading, the material clauses of the exceptions and conditions being as follows: "1. The act of God . . . . and all accidents, loss, and damage whatsoever from defects in hulk, tackle, apparatus, machinery, boilers, steam, and steam navigation, or from perils of the seas, ports, harbours, canals, and rivers, or from any act, neglect, or default whatsoever of the pilot, master, officers, engineers, crew, stevedores, servants, or agents of the owners in the management, loading, stowing, discharging, or navigation of the ship or other craft or otherwise, and the owners being in no way liable for any consequences of the causes before mentioned." "10. It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances, shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage."

The bags of sugar were stowed in No. 2 hold of the vessel,

H. L. (E.) 1909 — THE SCHWAN. — Lord Gorell.

and the damage was caused by sea water which found its way into that hold in the following way. The suction pipe of the ballast donkey pump in the engine room was connected through a cock with two pipes, an inlet pipe from the sea and a suction pipe from the bilges in the holds, including No. 2 hold. This cock, which is described as a three-way cock with a two-way inlet, was constructed so that by turning the plug of the cock water could be drawn by the donkey pump either from the sea or from the holds. The plug had a mark on the top of it which indicated the positions to which it should be turned in order to accomplish either object. The evidence shewed that the construction of the cock was defective in that if the plug were placed in certain positions it would be open all three ways at the same time, and therefore that water could flow direct from the sea through the pipes and cock into the holds. There were no marks on the plug to indicate these positions. In the bilge suction pipe, where it passed through the stokehold and could be examined, there was a non-return valve, designed so as to allow water to be pumped from the bilges, but to prevent water so pumped from flowing back from the pipe into the bilges.

It is established that in the course of the voyage the plug must have been in such a position as to allow sea water to flow into the bilge suction pipe, and that something, either tow or a chip, had become fixed in the non-return valve and prevented it from closing properly, and thus the sea water flowed into the No. 2 hold and did the damage.

The appellants' contention was that the defect in the cock rendered the vessel unseaworthy for the voyage; in other words, that she was not reasonably fit to carry the cargo, and that reasonable care and diligence had not been exercised by the shipowners or their agents to render her seaworthy in this respect.

The *Schwan* was a new vessel, built at Rostock, in Germany, in 1907, under the supervision of surveyors to the Germanischer Lloyd's, but none of these surveyors were called at the trial. Karl D. Meyer, an engineer, superintended the building of the vessel and the fitting of the machinery on behalf of the owners: after her completion he was chief engineer of the vessel. He

swore that he saw the cock while it was being constructed, that he was well acquainted with the way it worked, and that he knew when it was fitted that in certain positions all three ways were open. The learned judge who tried the case, Bargrave Deane J., did not believe this evidence. He stated in his judgment: "The owners employed the chief engineer to be at the yard, and to superintend from the beginning the putting together of the machinery of this ship, to test it, and to get thoroughly acquainted with it, which was a most proper course. He knew about this three-way cock being put into the ship. He ought to have discovered at the time that the plug of this three-way cock was not to be depended upon so as to be safe, and he ought to have known that unless it was very carefully manipulated the risk was run of its being partly open in all three ways at once. He says he knew it. I am sorry to say I do not believe it, because from the evidence of Herr Motting it is quite clear he did not." And, further on: "I do not believe that the chief engineer did know that the three-way cock would open three ways instead of two. It was not intended to open three ways, it was intended to open two only at a time. Therefore my belief is that the chief engineer neglected to test it at the time when he was placed by the owners in charge of the building of the ship, and of the management of her machinery in the Rostock yard where she was built."

The learned judge gave judgment for the plaintiffs on the ground that the defendants had not established that they exercised through their agent due care with regard to the machinery on board the vessel. I think it may be taken that, although he did not say so in terms, he thought that the vessel was unseaworthy, and he found that due care had not been taken by Meyer to guard against the unseaworthiness.

This decision was reversed by the Court of Appeal. That Court was advised by its assessors that the cock as constructed was a dangerous cock, but that a careful engineer could have adjusted the plug so that the pipe to the bilges would be closed when the pipe communicating with the sea was open, and that the non-return valve, if in working order, would be a sufficient protection against the entrance of any water which might get

H. L. (E.) 1909 THE SCHWAN. Lord Gorell.

into the pipe to the bilges in consequence of the construction of this particular valve; and the Court came to the conclusion, having regard to the advice given, that the vessel was not unseaworthy, and that so far as the cock was concerned the case fell within the principle of *Steel* v. *State Line Steamship Co.* (1) The Court considered that the passing of water through the cock was due to neglect of the engineer in not seeing that the plug was in its proper position, that the exceptions in the bill of lading protected the respondents, and that the obstruction in the non-return valve was also within the said exceptions.

My Lords, there is no controversy in the case as to the law applicable to it. The principles of that law are very fully stated in the case to which reference has been made.

The ordinary warranty that the vessel should be at the time of sailing seaworthy, that is, taking the whole circumstances together, reasonably fit for accomplishing the service which the shipowners engaged to perform, is modified in this case by the provisions of clause 10 of the bill of lading, and therefore the questions which must first be considered are whether the vessel was seaworthy; whether reasonable care and diligence were exercised by the shipowners or their agents to make her seaworthy; and whether, if these two questions are answered in the negative, the damage was occasioned by want of seaworthiness.

Now I agree with the Court of Appeal in thinking that it was established that the cock was of unusual construction. It ought to have been constructed in the ordinary and proper way, so that it was impossible for water to pass from the sea into the bilges of the vessel, whereas this was not only possible, but very probable, unless great care were taken. The advice given to the Court below, that the cock as constructed was dangerous, appears also to be thoroughly sound. The danger which will arise if a sea cock is fitted so as to permit of water passing from the sea into the holds of a vessel when the cock is in certain positions might almost be considered to be obvious, and it can hardly be said that there was any difference in the evidence of the experts on both sides on these two points. The evidence of Mr. Camps and Mr. Dudgeon for the appellants is very emphatic (record,

(1) (1877) 3 App. Cas. 72.

pages 12, 16, 23), and I think it clear, from the evidence of Mr. Steele, Mr. Winstanley, and Mr. Blackett, called for the respondents, that those gentlemen would not have passed such a cock (record, pages 74, 76, 81, 85). It was stated by Herr Motting, the marine engineer for the respondents, that the cock was of a form common in boats built in Germany, and was one of the regular pattern of the Rostock shipbuilding yard, and that he had four more under his charge fitted with similar cocks. But the cross-examination of this witness disclosed the fact that he had never examined the inside of the cock until after the damage in question arose and cannot have known of the defective construction until that date. There was no evidence produced by the respondents from the German surveyors on these points, nor is there any real support to be found in the evidence for the shadowy suggestion made by the respondents that there was a purpose in constructing the cock in the way in which it was made.

It was, however, contended by the respondents that even if the cock was of an improper and dangerous character, yet a careful engineer could have adjusted the plug so that the pipe to the bilges would be closed when the pipe to the sea was open, and so that the pipe to the sea would be closed when the pipe to the bilges was open, or, in other words, could have adjusted the plug so that water could not pass from the sea to the bilges, and that therefore the vessel could not be considered as unseaworthy. It was said that this was analogous to the case of a port hole which was considered in the case above referred to. In such a case an accessible port hole might be open or closed as required, and if improperly left open there would be negligence, but not unseaworthiness.

There is, I think, no doubt that if an engineer knew exactly the working of the cock he could put the plug in such a position that there would be no danger of the incursion of water into the vessel, though the evidence makes it clear that it would be a matter of some nicety so to adjust the plug. It is on the ground that this could be done by a careful engineer that the Court of Appeal has considered the case to be one of negligence and not of unseaworthiness.

H. L. (E.) 1909 THE SCHWAN. Lord Gorell.

But then comes in the consideration that, to make the proper adjustment, the necessary knowledge of the structure of the cock must be possessed by the engineer. Both sides are agreed about this. For instance, Mr. Camps, plaintiffs' witness, gives this evidence: "(Q.) Your objection to it is that it will leave three ways open at the same time? (A.) That is so. (Q.) In a certain position? (A.) In a certain position. (Q.) And you, having looked at it, can so manage it that it would never open in that way? (A.) Yes. (Q.) It is a matter, therefore, of the skill of the man who works it? (A.) Provided that he knew that it was so." Mr. Winstanley, for the defendants, is asked: "(Q.) But the marks do not shew, do they, that if you do not adjust them properly the water will find its way down?" His answer is: "You would have to know beforehand. Once you know, it is perfectly clear according to the marks."

As already stated, Bargrave Deane J., who saw and heard the witness Meyer, the chief engineer, has found as a fact that he did not at the material time know that the cock would open three ways instead of two, and there is absolutely no evidence that any of his subordinates were warned about the danger or knew anything about the peculiar structure of the cock. In the heavy weather which the vessel met with, pumping appears to have been required every four hours, and at these times the cock had to be altered, so that probably the other engineers besides the chief used it.

If the cock had been of a proper and usual character there would have been no danger in its use, and in my opinion the engineers in using the machinery would be entitled to assume that it was of such character unless they were warned to the contrary. There was nothing whatever in the marks or otherwise to indicate to them any necessity for any special care. In this respect, so far as relates to the exceptions in the bill of lading, during the voyage the chief engineer was in the same position as the other engineers, for, according to the judge's finding, he did not know of the peculiar structure of the cock.

The question then seems to be: Is a vessel seaworthy which is fitted with an unusual and dangerous fitting which will permit of water passing from the sea into her holds unless special care

is used, and those who have to use the fitting in the ordinary course of navigation have no intimation or knowledge of its unusual and dangerous character, or of the need for the exercise of special care, and might, as engineers of the ship, reasonably assume and act upon the assumption that the fitting was of the ordinary and proper character, which would not permit of water so passing however the fitting was used? I think this question should be answered in the negative.

With all respect, in my opinion the judgment of the Court of Appeal does not give its proper weight to this point. The position is this: the vessel was not reasonably fit to carry the cargo in the circumstances, for the cock in question was of an unusual, improper, and dangerous character, and those who had to use it on the voyage had no reason to suspect this, though if they had known the truth they could have adjusted the cock so as to prevent any risk of water getting to the cargo. That is to say, the vessel was, in respect of this cock, not reasonably fit to be worked in the way which might ordinarily be expected.

A further point to consider arises from the respondents' contention that the vessel could not be treated as unseaworthy because the bilge suction pipes were fitted with non-return valves, and that such valves formed an adequate protection against the admission of sea water into the holds through those pipes.

On examination in London it was found that the non-return valve on the pipe leading into the hold where the sugar was damaged had in it a piece of tow and a wooden chip which had prevented the valve from closing properly. It was shewn by the evidence that refuse of one kind or another may easily get to these valves, and they have to be examined from time to time to see that they are clear. So that these valves cannot be relied on with certainty to prevent the incursion of water into the holds.

To guard against the danger of water getting into the holds through pipes leading into them, rules are laid down by Lloyd's, rules for the construction of ships, the rules of the French Bureau Veritas, and the rules of the Germanischer Lloyd's. All these rules contain very stringent provisions to the effect that the arrangements shall be such as will not permit of water being run from the sea into a vessel by an act of carelessness or neglect.

H. L. (E.) 1909 — THE SCHWAN. — Lord Gorell.

The seventh of the German rules is this: "Wherever there is a possibility of the admission of water into a vessel's hold the pipes leading thereto must be fitted each with two valves working independently of each other, so that the flooding of a compartment, even when the valves are carelessly handled, is rendered impossible." It seems clear that this cock did not comply with either of the three sets of rules (see record, page 84), notwithstanding a suggestion that there was a sea cock as well.

I come, therefore, to the conclusion that the *Schwan* was not in the circumstances reasonably fit to carry the goods of the appellants, and that the damage was due to the unseaworthiness.

Then does clause 10 of the bill of lading protect the respondents? This depends on the question of fact whether Meyer, in his capacity as the agent of the respondents to superintend the construction of the ship and her machinery, exercised reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances. The finding of fact is that he did not. This finding is not affected by the fact that the vessel was built under the survey of the surveyors to the German Lloyd's. They may not in fact have inspected this particular cock, and it certainly is a remarkable feature of the case that none of them were called by the respondents, nor was any reason given to account for the absence of their evidence.

For these reasons, in my opinion, the appeal should be allowed and the judgment of Bargrave Deane J. restored with costs here and below.

Lord Shaw of Dunfermline. My Lords, the facts in this case have been stated by your Lordships who have preceded me, and my view thereon is in substantial accord with the narrative given. In my opinion it is established by the evidence that the sea cock of the *Schwan* was of unusual construction and was dangerous in the sense of permitting the access of sea water to the hold and cargo. This danger could have been avoided only on two conditions, namely, (1.) that it was known to exist, and (2.) that with the most scrupulous exactitude an adjustment could have been made on each use of the pump so as to avoid the peril.

With regard to the first, I accept and agree with the view of Bargrave Deane J. that the danger was not known to the chief engineer, who was the owners' superintending agent while the vessel was being built at Rostock, and who ought to have seen and appreciated it before the vessel put to sea; indeed I think such a danger did not occur to him until he was searching about in his mind for a possible cause of the accident. I therefore agree with the learned judge who tried the case, that paragraph 10 of the bill of lading affords no defence to the suit, because, in my view, the "reasonable care and diligence in connection with the ship, &c.," were not in fact exercised.

With regard to the second point, it is no doubt true that the need for care and exactitude in the working of even unusual appliances would not per se demonstrate unseaworthiness, and the principle of *Steel* v. *State Line Steamship Co.* (1) seems so far applicable. But there is a question of degree, and in the present case I cannot hold that the positive and serious danger arising from a peculiar, and, so far as I can see, positively needlessly peculiar, construction of part of the ship's tackle or machinery did not involve unseaworthiness. In the ordinary working of the ship in all weathers by an ordinary crew, such danger, in my opinion, was present, and was present to such a degree as to render the vessel unseaworthy and her owners liable on that ground.

LORD LOREBURN L.C. My Lords, I also think that this appeal ought to be allowed.

Order of the Court of Appeal reversed and judgment of Bargrave Deane J. restored with costs here and below.

Lords' Journals, July 19, 1909.

Solicitors: *Cattarns & Cattarns; Thomas Cooper & Co.*

(1) 3 App. Cas. 72.

[HOUSE OF LORDS.]

H. L. (E.) 1909 July 26.

ATTORNEY-GENERAL . . . . . APPELLANT;

AND

DUKE OF RICHMOND AND GORDON . . RESPONDENT.

Revenue—Estate Duty—Incumbrances—Bona fide Creation—Consideration—"Wholly for the deceased's own use and benefit"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 7, *sub-s.* 1 (*a*).

R., institute of entail in possession of estates in Scotland, without the consent of his son and grandson (the next two heirs of entail) disentailed the estates, acquired the fee simple under the Scotch Entail Acts, and secured to the satisfaction of the Court the ascertained values of the respective interests of his son and grandson by bonds in their favour charged on the fee simple. By later bonds he charged the fee simple with interest due on the first bonds. A desire to lessen the estate duties payable on his death was R.'s motive in these transactions, but they were all open, straightforward, and genuine, not fictitious or colourable. Upon R.'s death:—

Held by Lord Loreburn L.C. and Lords Macnaghten and Atkinson (Lords Collins and Shaw of Dunfermline dissenting), that the bonds were incumbrances created bona fide for full consideration in money or money's worth wholly for R.'s own use and benefit and took effect out of his interest within s. 7, sub-s. 1 (*a*), of the Finance Act, 1894, and that deductions accordingly ought to be allowed in assessing the estate duties.

The decisions of Bray J., [1907] 2 K. B. 923, and the Court of Appeal, [1908] 2 K. B. 729, affirmed.

THE circumstances of this appeal are stated in the judgments of Lords Macnaghten and Shaw of Dunfermline and in the reports of the two decisions below.

April 22, 23. *Sir W. S. Robson, A.-G.*, and *Sir R. B. Finlay, K.C.* (*Sargant* with them), for the appellant. The whole series of transactions constituted one scheme, with one object in view, which was to create debts to be deducted and so diminish the death duties payable under the Finance Act, 1894. All the parties employed the same agents, which suggests that they all had a common purpose. That purpose was inconsistent with the requirements of s. 7, sub-s. 1 (*a*), of the Act of 1894, which only

admits an allowance for debts or incumbrances created (1.) bona fide, (2.) for "full consideration in money or money's worth," and (3.) "wholly for the deceased's own use and benefit." The burden of proving the existence of these conditions rests on the person who claims the deductions. The term "bona fide" is not perhaps necessary for the full effect of the section, but is significant and not redundant. It introduces the element of motive or purpose. There was no intention to benefit the late Duke, who was not in fact benefited by these bonds. The persons benefited were Lord March and Lord Settrington, who would have to pay the duties. It is not sound argument that the motive which actuated the late Duke was immaterial when once the conclusion was reached that these were real deeds intended to have a real operation. In *Penn* v. *Alexander* (1) the question was the bona fide traveller. "The test," said Collins J., "must be the object of the journey." If the man simply travels to get the drink he is not a bona fide traveller. In *Fulham Guardians* v. *Thanet Guardians* (2) the expression to be construed was "bona fide charitable gift," and Manisty J. said that the question was whether the gift was made "with the bona fide view of maintaining the pauper." Motive was there held to be the test. The expression is also illustrated in *Alexander* v. *Newman* (3), where it was held that a conveyance of land for a bona fide consideration to a number of purchasers was valid, though the avowed object was to multiply votes. But there, as in *Inland Revenue Commissioners* v. *Angus* (4), the transaction was a real one and fulfilled the statutory conditions. In the latter case an agreement for the sale of a business was held not liable to ad valorem duty, and Lord Esher M.R. said: "The Crown must make out its right to the duty, and if there be a means of evading the stamp duty, so much the better for those who can evade it." Similarly in *Simms* v. *Registrar of Probates* (5) a covenant in favour of children on which interest was regularly paid, conferring complete ownership of the debt, was held to be a non-testamentary disposition and not liable to duty. It was

(1) [1893] 1 Q. B. 522.
(2) (1881) 6 Q. B. D. 610.
(3) (1846) 2 C. B. 122.
(4) (1889) 23 Q. B. D. 579, 593.
(5) [1900] A. C. 323.

H. L. (E.) 1909 ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE).

held not to have been made "with intent to evade the payment of duty." The distinction is drawn between avoid and evade, the latter importing, as Lord Hobhouse said, "some kind of underhand contrivance." The word "evade" is also discussed in *Bullivant* v. *Attorney-General for Victoria*. (1) That was a question of privilege between solicitor and client which could only be displaced, as Lord Halsbury said, by "some secret and covinous arrangement whereby . . . . colourable deeds should be executed which should shew that the property was not liable to duty." Lord Halsbury's words are inapplicable here. *Lord Cowley's Case* (2) is equally removed from the present case. In *Simms's Case* (3) such steps as were here taken would have been disapproved. The burden of proof is not on the Crown, but on the subject, who must establish that these bonds were "wholly for the deceased's own use and benefit." The successors reaped a greater benefit than the Duke, who could only enjoy his enlarged interest in the property for a few years. The Courts below seem to have treated motive as an immaterial consideration. The sub-section is carefully framed to exclude the deduction of debts created for the purpose of diminishing the taxation.

Danckwerts, K.C., and *Buckmaster*, K.C. (*Austen-Cartmell* with them), for the respondent. Analysis of the figures shewing the value of the property proves that the late Duke received ample consideration for parting with his life estate. The settled property was worth considerably over a million sterling, though its value had, partly in consequence of the increase of public burdens, been diminished. The question of evasion is neatly disposed of by Chitty L.J. in *Attorney-General* v. *Beech* (4): "The whole argument on evasion of the Act is fallacious. The case either falls within the Act or it does not. If it does not there is no such thing as an evasion." The words "for the deceased's own use and benefit" are explanatory of "full consideration." An incumbrance for full consideration may well be for the benefit of both parties. The whole foundation of the appellant's case was that there was a scheme, but that seems now to be abandoned. Then the question of motive is introduced, and the argument

(1) [1901] A. C. 196.
(2) [1899] A. C. 198.
(3) [1900] A. C. 323.
(4) [1898] 2 Q. B. 147, 157.

must go to the length that wherever there is a desire to escape duty the transaction cannot stand. Suppose the late Duke desired to obtain the fee simple as he did obtain it. Was it not for full consideration? The bonds constituted full consideration. The value of the reversion increases with the age of the tenant for life. The next question is, Did the consideration reach the hands of the deceased? The answer is that it did, and once there, he was at liberty to do what he liked with it. If the bonds had been transferred for their full value, the holders could unquestionably have enforced them. There was no evidence of an arrangement between the parties, and Bray J. held that there was no arrangement or agreement. The words "bona fide" simply mean that the documents shall not be a sham or collusive transaction, and that is not now alleged. Similar language is found in most taxing Acts. In the Succession Duty Act, 1853, s. 8, the phrase is "any secret trust." But the meaning is the same in all cases, and there is here no evidence of any agreement or understanding to disentitle the respondent from the deduction of these sums.

Sir W. S. Robson, A.-G., in reply. The conditions prescribed have not been fulfilled, and the fact remains that the late Duke gave up most of his estate for a consideration which he declined to enjoy.

The House took time for consideration.

July 26. Lord Loreburn L.C. My Lords, I have had the advantage of reading in print the opinions of my noble and learned friends Lord Macnaghten and Lord Atkinson, and I agree with the conclusion at which they have arrived. It is not necessary to decide finally whether the words "wholly for the deceased's own use and benefit" are to be read with the word "created" in s. 7, sub-s. 1 (*a*), of the Act of 1894, or relate only to the "consideration." If the latter, then no doubt the consideration for the incumbrance was received wholly for the late Duke. If the former, I think the incumbrance was created wholly for the late Duke's use and benefit, in the sense that this was the direct and immediate purpose, as pointed out by Lord Macnaghten. And this suffices where the other conditions of the section are

H. L. (E.) 1909 ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE).

satisfied. I see no other arguable point in the case. It is not my province either to censure or to commend the transaction itself. It was within the law and without dishonesty. If this case has disclosed a way by which settled property may largely escape the estate duty, that is an affair for the Legislature to consider, in which Courts of law have no concern.

LORD MACNAGHTEN. My Lords, the question involved in this appeal has at last been brought within a very narrow compass. In the case as originally presented on behalf of the Crown there were charges and insinuations of bad faith which ought never to have been made. Those charges and insinuations were disproved at the hearing, and they have been abandoned or dropped, somewhat grudgingly I think, and with some appearance of reluctance. However, they are out of the way now, and the only question remaining is a question of construction, a question perhaps of some difficulty, arising as it does on one of the least intelligible sections in an Act of Parliament not remarkable for perspicuity.

In 1897, three years after the passing of the Finance Act, 1894, the late Duke of Richmond was minded to acquire in fee simple certain estates in Scotland known as the Gordon Richmond estates, of which he was then institute of entail in possession. There is no doubt about the motive which influenced him. He was advised by the solicitor of the family, a gentleman of the highest standing (and advised, I suppose, rightly), that if the entail were subsisting at the time of his death the principal value of the entailed estates would be aggregated with the rest of the property passing on his death so as to form one estate, but that it was competent for him under the law of Scotland, with the consent of the next two heirs of entail, his eldest son, then Earl of March, who is the present Duke, and his grandson, Lord Settrington, or failing their consent on paying or securing to the satisfaction of the Court the ascertained value of their respective interests, to acquire the estates in fee simple. He was further advised (but the soundness of this advice is questioned in these proceedings) that if he acquired the fee simple, then, although the principal value of the Gordon Richmond estates

would still fall to be aggregated with the rest of his property, the value of the estate subject to duty would be diminished by the sums paid or secured as purchase-money or compensation for the interests of his son and grandson.

The Duke acted on the advice of his solicitor, conceiving, rightly or wrongly, that he was not under any obligation, legal or moral, to keep his property in a form peculiarly and unnecessarily obnoxious to an impost which I am afraid many people still think unequal and unfair. Everything was done in an open and straightforward manner, without subterfuge or concealment of any kind or any attempt to make the transaction appear other than what it was in reality. The sanction of the Court was applied for on the footing that Lord March and Lord Settrington failed to consent. The procedure was regular and proper throughout. The interests of the next two heirs of entail were valued under the direction of the Court, and the amount of the valuation in each case was secured on the fee simple of the Gordon Richmond estates to the satisfaction of the Court.

On the death of the late Duke, which occurred in 1903, his executor, the present Duke, who succeeded under the late Duke's will or trust disposition, claimed an allowance in respect of the sums secured in his favour and in favour of his son on the fee simple of the Gordon Richmond estates. The Commissioners of Inland Revenue rejected the claim. An information was brought by the Attorney-General to enforce their view. Bray J. dismissed the information with costs, and the Court of Appeal sustained his decision.

I think the judgment of the Court of Appeal is right.

The question depends on the meaning and effect of the language used in s. 7, sub-s. 1 (*a*), of the Finance Act, 1894. I cannot help approaching the question with some diffidence, because, as your Lordships may remember on a former occasion, when this sub-section was much discussed, a noble and learned lord, who was a much greater authority on questions of this sort than I can pretend to be, observed in this House that the sub-section was "not an easy one to construe," and that he was not satisfied that he had "quite mastered the meaning of it." (1) In

(1) By Lord Davey in *Earl Cowley's Case*, [1899] A. C. 198, 221.

H. L. (E.) 1909

ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE).

Lord Macnaghten.

that case it was not necessary to solve the difficulty. Your Lordships are confronted with it now. And it must be solved. Some meaning must be given to the enactment, however obscure the language may be. After all, there is little room for argument. The puzzle lies in an expression contained in only eight words. No allowance, says the enactment, is to be made "for debts incurred by the deceased or incumbrances created by a disposition made by the deceased" unless four conditions have been complied with. It must appear that (1.) "such debts or incumbrances were incurred or created bona fide"; (2.) "for full consideration in money or money's worth"; (3.) "wholly for the deceased's own use and benefit"; "and" (4.) that they "take effect out of his interest."

It cannot, I think, be disputed that conditions 1, 2, and 4 have been satisfied. The debts to Lord March and his eldest son were incurred bona fide, and the incumbrances intended to secure those debts were created bona fide in the only sense in which the term bona fides can be used in such a connection, that is to say, the debts and incumbrances were not fictitious or colourable, but real and genuine to all intents and purposes. The consideration given was the full consideration, for the amount was judicially ascertained and settled by the Court. Again these debts and incumbrances undoubtedly took effect out of the interest of the late Duke. So far there cannot, I conceive, be any difficulty. Then comes the pinch of the case. Were these debts and incumbrances incurred and created "wholly for the deceased's own use and benefit"? The learned counsel for the Crown say "No. They were mainly, if not wholly, for the benefit of the deceased's successors." And that is perfectly true in the result. If you give the expression its strict meaning, adhering slavishly to the letter, no allowance can be made for any debt incurred by the deceased or any incumbrance created by him which in the slightest degree operates for the benefit of any other human being. The argument must go this length. The word "wholly" forbids anything short of it. The condition that a debt or incumbrance or the consideration for such debt or incumbrance (if that be the true reading) must be wholly for the benefit of a particular individual excludes every case where anybody else

participates in the benefit. If the construction for which the appellant contends be right, a man who burdens his property to portion his daughter, to educate or advance his son, to save a friend from ruin, to effect some lasting improvements on his estate which cannot give an immediate return, or to promote some benevolent object or some object of real or supposed public utility, to endow a hospital, for instance, or save a famous picture for his country, cannot hope for an allowance from the Commissioners of Inland Revenue. That concession is reserved for the man who spends on himself alone, for the prodigal, the gambler, and such like. I cannot bring myself to think that the Legislature deliberately intended to put a premium on extravagance purely selfish, and to penalize expenditure on objects generally considered more worthy.

What, then, is the meaning of the expression of which so much was made in the argument? It seems to me that the words of the enactment are satisfied if the direct and immediate purpose of the person incurring the debt, or creating the incumbrance, is to make himself master of a sum of money over which he, and he alone, has power of disposition; and that it was not intended that there should be any inquiry into the ulterior and more remote purposes of the transaction or any investigation into motives. The motive in this case is transparent, and it was openly avowed. But motives for the most part are complex and often extremely obscure. And if the appellant's contention were to prevail the door would be open to harassing inquisition and constant litigation.

The result is that, in my opinion, all the conditions required to entitle the respondent to the allowance which he claims have been satisfied, and the appeal should be dismissed with costs.

So much for the question of construction. It is really the only question. But, perhaps, having regard to some things said in the course of the argument, I may be forgiven for adding a word or two on a broader aspect of the case. Your Lordships were warned by the learned counsel for the appellant of the appalling consequences of the decision under appeal. "Here," they said, "is a tremendous hole in the Finance Act discovered by the ingenuity of a Scotch solicitor. The great fishes which

H. L. (E.) 1909

ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE).

Lord Macnaghten.

the Commissioners look upon as their own will swim through the gap one by one. The duller-witted Southron will follow the lead. And what will become of the revenue of the country?" My Lords, I do not think the prospect so gloomy, nor can I see that any extraordinary astuteness was required to recommend the course which the late Duke adopted. I should think the eminent solicitor who was the Duke's adviser would be the first to disclaim the left-handed compliments lavished on his skill.

The law of Scotland authorizes heirs of entail in possession to break the fetters of the entail on compensating interests in expectancy. That is all the Duke did. There is no similar procedure in England. As Mr. Clyde explains in his evidence, "the principles of Scotch entail law are fundamentally different from the corresponding laws in force in England." But what is practically the same thing is done here every day, and nobody complains. If a settlement is spent, the persons interested in the settled funds—the tenant for life and the remaindermen not being under disability—may divide the funds between them, and so the estate of the tenant for life may escape death duties which if the settlement remained in existence it would have to pay. Suppose 10,000*l.* were settled on A.'s marriage upon A. for life, with remainder to the wife for life, with remainder to the children who attain twenty-one. Suppose the wife is dead, and the children are all of age and under no disability, why should not the settled funds be divided between the father and the children according to their interests? Practically that was what was done in this case. Only the law of Scotland offers special facilities to enable the heir of entail to put an end to the entail and disentangle or sever his interest from the interests in expectancy. There is nothing here in the nature of a gift. The Duke did not part with any property that was really his own. There was nothing but a purchase on statutory conditions carried out under the direction of the Court. If the Duke had paid money down, what could have been said against the arrangement? If he had borrowed the money from his bankers the transaction would not have been open to objection. There can be no difference in principle between paying ready money for what you buy and giving full security for the price. And, so far as I can see,

there is nothing in the Finance Act to forbid or penalize the transaction, whether it be effected by present payment or by giving adequate security.

LORD ATKINSON. My Lords, in this case, the facts of which have already been stated with sufficient fulness, fraud is not relied upon by the Crown. It is on the contrary admitted that the transactions which took place between the late Duke of Richmond and his son and grandson, the next heirs in tail to his Scotch estates, up to and inclusive of those of October 20, 1897, were real and genuine as opposed to colourable transactions. If so, the incumbrances on these estates created by the late Duke were, in my opinion, created bona fide within the meaning of s. 7, sub-s. 1 (*a*), of the Finance Act of 1894. It is admitted that the motive which prompted the late Duke to enter into these transactions was to relieve from the payment of estate duty those estates which upon his death would pass to another or to others. That motive does not, however, vitiate the transactions, no more than it vitiates a voluntary alienation of property made with the same purpose and object twelve months before a donor's death. Just as there is nothing illegal or immoral in making such a gift, or in living for twelve months afterwards so as to make it an effectual means of escape from death duties, so there is, in my opinion, nothing illegal or immoral in making the dispositions of property which were made in this case.

I further think that the case must be determined solely with regard to the legal rights and interest which the respective parties had acquired in October, 1897, the date of execution of the impeached securities. What they did afterwards, how they chose to dispose of those legal interests or to exercise those legal rights, is, in my view, irrelevant. It might have been legitimate to inquire into these matters subsequent, if the transactions which were concluded on that day had been impeached as unreal, colourable, or sham transactions; but they have been admitted to be real and genuine in their character, and, if so, all the subsequent dealing with the estate and the interest created in it lie outside the field of inquiry, even though by their operation they practically restore the status quo ante. The question for decision,

H. L. (E.) 1909 — ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE). — Lord Atkinson.

therefore, simply resolves itself into this: Were the incumbrances which were in fact created in October, 1897, to use the words of s. 7, sub-s. 1 (*a*), of the statute, "created bona fide for full consideration in money or money's worth, wholly for the deceased (Duke's) own use and benefit, and" did they "take effect out of his interest"?

It is clear they fulfilled this last requirement, as they took effect out of the fee of the lands which by the disentailing proceedings he had acquired. Were they created bona fide? They cannot, for the reasons already given, be held, I think, to have been created mala fide, simply because they constituted one step in proceedings designed to provide a means of escape from the payment of estate duties.

The next question is, Did they by their operation confer upon the heirs in tail the legal rights they purported to convey? If the Earl of March or Lord Settrington sought to put them in suit, it cannot be contended that he could have been restrained by any proceeding in any Court of law or equity.

But if these instruments thus did what they purported to do—conferred in law and in fact the rights and interests they purported to confer—I fail to see how they could be held to have been created otherwise than bona fide. Then were they created for full consideration in money or money's worth?

If the Earl of March and Lord Settrington had in the year 1897 been tenants in fee in remainder of these estates, instead of being next heirs in tail of them, and the late Duke had purchased these respective interests in remainder at a price fixed by public authority as their full value, and on payment of this price had taken a conveyance of those interests to himself, thereby through the merger of his life interest converting himself into the owner in fee in possession, it could not be suggested that he had not received full consideration in money or money's worth for the money he had paid. And if, instead of paying the purchase-money, he had executed a mortgage of the fee simple thus acquired in favour of his son, for the full amount of the purchase-money, with interest till paid at a certain rate, it would be equally impossible to suggest that the mortgage security, the incumbrance of the fee, had not been created for full

consideration in money or money's worth, namely, the interests in remainder which, ex hypothesi, were full value for the sum secured. But what the late Duke did in fact, in this case, though differing from these in legal character and operation, was, in effect and ultimate result, the same. He purchased from his next heirs in tail the consent which enabled him, under the statute, to destroy their interests in the estate, and to convert himself into the owner in fee at a price equal to the full money value of the interest destroyed. Had he paid this price in money, it could not be contended with success in this case no more than in the other that he had not received full consideration in money or money's worth for the money he had paid. That consideration was, in reality, the fee of the estate, which necessarily exceeded in value the interest of the next heirs by the value of the Duke's own life estate.

It cannot make any difference in the legal result of the transactions if he mortgaged the fee for the amount of the purchase-money instead of paying that sum in cash. In this case, as in the former, the incumbrances must be held to have been created for full consideration in money or money's worth. It was urged, however, that these incumbrances were not created wholly for the benefit of the deceased Duke. And that, no doubt, is perfectly true. They were, however, created as completely and entirely for his benefit as is any mortgage given by a mortgagor to secure a debt due by him created for the benefit of that mortgagor, and were created as much for the benefit of the next heirs as is any mortgage given to secure a debt due to a creditor created for the benefit of that creditor. The incumbrances in this case were, in my view, created, as all securities of that kind, mortgages or other, must be created, for the benefit both of the person who creates them and of the person in whose favour they are created. In my opinion every contract for value freely entered into must, in the absence of fraud, be held in contemplation of law to have been entered into for the benefit of each of the parties to it. The consideration which each receives, especially if it be money or money's worth, may be received wholly for the benefit of the recipient, but the contract entered into binds him to give as well as entitles him

H. L. (E.) 1909

ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE).

Lord Atkinson.

to receive. Consideration must move from him as well as to him. The contract cannot, therefore, I think, be held to benefit him alone.

And I do not think that the provisions of the 7th or any other section of the Finance Act of 1894 require that the financial transactions of deceased owners of property should, for the purposes of that statute, be dealt with by Courts of law on any different assumption. It never could have been intended, for instance, that it was competent for a Court of law, in the case of a loan secured by mortgage, to hold that the incumbrance was created wholly for the benefit of the mortgagor, and wholly to the detriment of the mortgagee, if the security was in fact worthless, or on the other hand to hold that it was created wholly to the detriment of the mortgagor, and wholly for the benefit of the mortgagee, if the rate of interest was excessive or the other provisions of the mortgage harsh, and it was proved that the mortgagor could have borrowed elsewhere on easier terms. I do not think that s. 7, sub-s. 1 (*a*), imposes a condition so impossible to satisfy as that contended for. I concur, therefore, with the Court of Appeal in thinking that the words "wholly for the deceased's own use and benefit" apply to the consideration given for the incumbrance, not to the incumbrance itself, and simply mean that the deceased, the person who creates the incumbrances, must receive the full consideration in money or money's worth as his own, to be disposed of by him in any way he pleases, free from the control or interference of others. If this sub-section, or rather that portion of it which deals with the creation of incumbrances by the deceased owners, be considered in connection with s. 3, I think it will appear that this is its true construction.

Sect. 3 deals with the alienation of property by its owner or with the carving by him of interest out of it in favour of others. This portion of s. 7, sub-s. 1 (*a*), deals with the creation by an owner of property of incumbrances upon it. They are kindred operations. In s. 3 it is provided that in order that the property alienated or the interest created by an owner may escape taxation when it passes on his death full consideration in money or money's worth must have been paid to him "for his own use or

benefit"; that is, I take it, must have been paid to him as his own to be disposed of as he wills. Sect. 7, sub-s. 1, provides that, in order that the amount of an incumbrance created by the deceased owner may be deducted from the amount on which duty is to be paid, full consideration in money or money's worth must have been given to him "wholly for his own use and benefit." Nothing turns on the use of the word "and" in the latter case instead of "or."

The aim and object of both provisions is apparently the same—first, to prevent evasion by fictitious sales or the creation of fictitious interests or incumbrances, or the acknowledgments of fictitious debts, and, second, to prevent the tax being in effect levied twice over on the same property. When the owner of property alienates it, he diminishes by the value of that property the amount of property which remains with him and which will presumably pass upon his death and consequently be taxable; but if he receives the full money value of that which he has parted with, the taxable fund is brought back to its old level. It would be unjust to tax first the property alienated and secondly the money paid for it. That would be taxing the same property twice, and consequently the property alienated is in such cases treated as if it did not pass on the death of the vendor, and the tax is presumably levied on the purchase-money which represents it. In furtherance of this object it is provided that where partial, not full, consideration is received the alienated property is taxed, but, to avoid injustice, a deduction is made in respect of the partial consideration so received.

Similarly in the case of debts and incumbrances, these are to be allowed for under s. 7, sub-s. 1, if not incurred or created by the deceased, because the amount of the net assets left by him, on which duty is rightly payable, is only what remains after they have been deducted; but, as in the other case, to prevent evasion and at the same time to avoid taxing the same thing twice over, it is provided that debts and incumbrances incurred or created by the deceased may be deducted and the taxable fund thereby diminished to the amount of the debt or incumbrance only where he has received in respect of them full consideration in money or money's worth—that is, has received an equivalent

H. L. (E.) 1909

ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE).

Lord Atkinson.

addition to the taxable fund, bringing it up to its original level. It is obvious, however, that the consideration received could not pass into the taxable fund if persons other than the deceased had any interest in or control over it; and consequently it must be received by him "wholly for his own use and benefit" just as the purchase-money of lands sold must be paid to the vendor "for his own use and benefit."

If in such a case no allowance were made, the taxable fund would presumably be artificially swelled by the amount of the consideration received, and the duties in effect levied twice over.

In my opinion, therefore, the decision of the Court of Appeal was right and this appeal should be dismissed with costs.

LORD COLLINS. My Lords, I need not say that it is with profound diffidence that I venture to differ from the unanimous judgment of the Master of the Rolls and his colleagues in the Court of Appeal. I cannot, however, persuade myself that the incumbrances in respect of which deduction is claimed in this case were "created wholly for the late Duke's own use and benefit" within the meaning of s. 7, sub.-s. 1 (*a*), of the Finance Act, 1894. I accept unreservedly the conclusions of fact found by Bray J., and adopted by the Court of Appeal, and I do not at all question the right of an owner of property so to dispose of it, if he can, as to keep it outside the meshes of a taxing statute. But the real question here is whether he has succeeded in doing so. In my opinion he has not. It is common ground and expressly found by the learned judge that "it was the intention of the late Duke to bar the entail and to make himself owner in fee simple of the Gordon Richmond estates subject to the incumbrances, including the bonds, but that the motive which mainly actuated him in taking the steps which he did for that purpose was that he would thereby diminish his estate and lessen the estate duty payable on his death." Can an incumbrance created mainly from such a motive be fairly said to be "incurred or created wholly for the deceased's own use and benefit," and not in whole or in part for that of his successor? I think not. No doubt the learned judge was perfectly logical in holding, notwithstanding this finding, that the deductions were legitimate,

because his view was that "the freeing the estate from estate duty at the owner's death is really a benefit to the owner. He has so much the more at his disposal." But from this particular view of the learned judge each member of the Court of Appeal expressly differed, and no argument in support of it was urged before us.

The learned judge further fortified his opinion that no objection could be sustained on the ground that the incumbrances were not created wholly for the deceased's own use and benefit by construing the section as enacting, not that the creation of the incumbrance, but that the money or money's worth, i.e., the consideration, must be wholly for the deceased's own benefit. The Court of Appeal seems to have read the section in the same way. In my opinion that interpretation is not consistent with the plain grammatical construction of the section. Debts and incumbrances are the nominatives which govern the verbs throughout the sentence, and they must fulfil four conditions: they must be made (*a*) bona fide; (*b*) for full consideration; (*c*) wholly for the deceased's own use and benefit; (*d*) must take effect out of his interest. The reason which the learned judge gives for rejecting what seems to me the natural construction of the sentence is that incumbrances must always be partly for the benefit of the person in whose favour they are created, and therefore could not ever be created wholly for the use and benefit of their creator.

I do not think this incident of an incumbrance at all qualifies the true interpretation of the section. Just as money may be expended so may an incumbrance be created wholly for the use and benefit of the person paying the money or creating the incumbrance, though money passes to a third person in the one case, and the right to enforce the security in the other. There being, therefore, no barrier to interpreting the section according to its natural grammatical meaning, and the only suggestion whereby the avoidance of death duty may be regarded as enuring wholly for the benefit of the deceased rather than of his successor being ruled out, it would seem to follow that the creation of the incumbrances in this case cannot be brought within the conditions permitting deduction. The Legislature would seem to have

H. L. (E.) 1909

ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE).

Lord Collins.

fenced round permissible deductions with the precautions above mentioned in order to provide that the estate thus made liable to depletion should receive an equivalent addition in return for the incumbrance.

But even if the grammatical construction put on the section by the Courts below be adopted, I am far from satisfied that "full consideration in money or money's worth" was received by the deceased in return for the incumbrances. In fact, if it had been, it might have defeated the main purpose of the transaction, which involved a diminution in the value of the estate to be left in the hands of the settlor at the close of the transaction. In fact, the machinery put in operation by the elaborate processes adopted would have failed in its main object if it had left the estate which it was contemplated would pass on the death of the settlor of the same value at the close of the proceedings as it would have been had no settlement been made. It was through the means of allowable deductions only that the intended diminution of the taxable value of the estate could be brought about, and to the extent of such deductions the consideration was less than full. Looking, as we are entitled to do, at the transaction as a whole, there is no doubt that the interests of Lord March and his son in the estate which the late Duke was to buy up were carefully assessed at the sum for which the incumbrances were created, but the proper equivalent in return for the incumbrances to such an amount would have been an estate equivalent to the sum total of those interests and unencumbered by a charge for the purchase-money. But it was part of the arrangement that the purchase-money was to be secured on the estate not paid, and therefore the consideration intended to be given, and actually given, was less than full by the value of the incumbrances, and thus furnished ground for claiming the deduction which has been allowed.

There is no evidence that the dominion acquired over the fee was really desired with a view to altering the succession, or had any special value for that reason. In point of fact, the property was at once resettled as nearly as possible on the old lines. I cannot think that a claim thus manufactured can be held good. For these reasons, I think, the appeal should be allowed.

LORD SHAW OF DUNFERMLINE. My Lords, on October 6, 1897, the late Duke of Richmond granted a bond and disposition in security over his estates after mentioned for 415,000*l.* in favour of his son the present Duke. On the same date he granted a bond over the same estates for 287,000*l.* in favour of his grandson, the present Earl of March. The question in the present case is whether, in determining the value of these estates for the purpose of estate duty, allowances should be made for these incumbrances.

The provisions of s. 7, sub-s. 1, of the Finance Act, 1894, applicable to the present case are as follows: "In determining the value of an estate for the purpose of estate duty allowance shall be made . . . . for debts and incumbrances; but an allowance shall not be made—(*a*) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest."

I am of opinion that in order to arrive at a just determination upon the elements for consideration presented by this clause it is necessary to consider not merely the transaction of creating incumbrances by itself, but the entire transaction of which they form a part. I think that this must be done if mistake is to be avoided. It is for that reason that I give the brief narrative which follows.

Among the Scotch Entail Acts cited in these proceedings the Rutherfurd Act (11 & 12 Vict. c. 36) and the Act of 1875 (38 & 39 Vict. c. 61) are those outstanding. By the former of these Acts, an heir of entail in possession received for the first time in the law of Scotland power to disentail on obtaining the necessary consents of succeeding heirs. By the latter statute, such consents, if not given, might in the case of new entails, of which this is one, namely, entails executed after August 1, 1848, be dispensed with by the Court on payment of the value of the expectancy or interest of the heir or heirs of entail.

The beginning of the series of transactions after mentioned was made on April 12, 1897, when a petition was presented

H. L. (E.) 1909

ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE).

Lord Shaw of Dunfermline.

to the Court of Session by the Duke of Richmond, Gordon, and Lennox, the prayer of which was for disentail of what may be comprehensively termed the Gordon Richmond estates lying in six counties in Scotland. The petition necessarily craved for service upon the succeeding heirs of entail, and in the event of any of those whose consent was necessary refusing or failing to give such consents, then for the ascertainment of the value in money of such heirs' expectancy or interest, and the payment of the amount or the giving of proper security therefor over the entailed estates. Upon such payment or security the Court was asked to dispense with consent and to approve of the instrument of disentail tendered in the course of the proceedings. The parties were at one as to the object to be achieved: the consent of the heirs of entail was not given: mortgages were accordingly granted for their interests, and after various steps of procedure the petition was granted.

So far, my Lords, as the proceedings are concerned they appear to have been in proper form. This observation applies not only to the valuation of the interests of those heirs whose consent was necessary, but also to the bonds and dispositions in security granted over the estates and to the instrument of disentail. The procedure is accurately summed up and ratified in the interlocutor of Lord Pearson of October 20, 1897.

As already stated, the finance of the transaction was arranged by security being given over the estates to the next heirs for the ascertained value of their interests, that value being in the case of the Earl of March, now the present Duke, 415,000*l.*, and of Baron Settrington, now the Earl of March, 287,000*l.*, together a sum of 702,000*l.* As the late Duke of Gordon was at the date of his petition seventy-nine years of age, it is plain that actuarially the value of the succeeding heirs' interest, for which bonds and dispositions in security had to be granted, went a long way towards evacuating the entire value of the entailed estates. As it turned out, this evacuation was completed prior to the Duke's death on September 27, 1903. In the interval between the disentail proceedings and his death instalments of interest became due on the bonds and dispositions in security. These were not, however, paid: from beginning to end of the

series of transactions no money passed. At certain dates balances of overdue interest were struck, and further bonds and dispositions in security over the estates were granted to the amount of 88,000*l*. The result was that, so far as the financial interest of the late Duke of Richmond and Gordon in the Scotch Gordon Richmond entailed estates was concerned, that interest had at the date of his death been reduced to nothing. Indeed, in the estate duty account presented by the solicitors to the Inland Revenue it is expressly stated that there is an excess of debts and incumbrances over the value of the heritable property of 47,092*l*.

So far for finance. But as the statute under construction deals not only with bona fides and full consideration, but provides that the incumbrances are to be created bona fide for full consideration "in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest," it becomes necessary to inquire what became of the Gordon Richmond estates, thus left unentailed but depleted in value in the hands of the late Duke; and, secondly, what became of the sum of over 700,000*l*., for which, as stated, his Grace granted incumbrances in favour of his son and grandson. With regard to the estates themselves, the late Duke of Richmond, on April 20, 1898, executed a mortis causa deed of entail in favour of the same line of succession as that favoured by the entail of 1872. With regard to the 700,000*l*., that was settled by an assignation and deed of trust, dated November 11 and 15, 1897, and recorded November 18, 1897. Substantially the result arrived at by these deeds was to put the money represented upon trust for the same line of succession, namely, the old heirs of entail.

It will be seen, accordingly, that at the end of these transactions the parties affected thereby were, for practical purposes, restored pretty nearly to the identical position which they occupied at the beginning. This, I think, was exactly what was sought to be achieved. Whatever may have happened to others, it is at all events fairly clear that the one man who had not benefited was precisely the petitioner for disentail, the grantor of repeated mortgages, and the re-entailor of the reversion, the late Duke himself. For myself I can see no benefit produced to the late Duke of Richmond and Gordon by

H. L. (E.) 1909

ATTORNEY-GENERAL v. RICHMOND AND GORDON (DUKE).

Lord Shaw of Dunfermline.

this series of transactions, and I am unable to affirm that the incumbrances which formed the essential items of the series were, in the language of the statute, "for the deceased's own use and benefit."

What the motive for the transaction was is not denied. Answering the learned judge who tried the case, his Grace speaks with perfect frankness to a conversation with his father. "You had a conversation with your father before he began this transaction?—Yes. He told you what his motive was?—Yes; his motive, as I think I said yesterday, was to lessen the amount of the death duties if he could." The interests of all the three parties to the transaction were ably attended to by the same firm of solicitors. They accepted the task of endeavouring to give effect to the motive of the late Duke. In doing so they incurred no risk of prejudicing the interest of his son or grandson. On the contrary the result, if it could be legally accomplished, would benefit them, as, under the judgments appealed against, it has benefited them by a saving in estate duty to the amount of 55,000*l*.

My Lords, that saving of estate duty (I purposely do not use the term evasion or even avoidance of estate duty) formed the object and purpose of the transaction. It was for this that the incumbrances were created, and not "for full consideration in money or money's worth wholly for the deceased's own use and benefit" or to "take effect out of his interest." The saving was not to take effect till he was dead, and then could be for the benefit only of those who would have the estate duty to pay. I therefore agree with the conclusion arrived at by Lord Collins. In doing so I admit to the full the difficulties arising out of the clause and referred to in the judgment of Lord Macnaghten.

My Lords, on the construction of the sub-section, I agree that the insertion of the words "bona fide" would, of course, hit a fraudulent creation of an incumbrance, but I think, further, that the words "bona fide" must be read in collocation with the other words, "for full consideration in money or money's worth, wholly for the deceased's own use and benefit." By this I mean that the transaction of creating the incumbrances must not be technically and apparently for the benefit of the grantor, but really and

intentionally so. I cannot think that this was the case in the present instance.

With reference to the judgments in the Courts below, I will only say that they do not appear to me to give effect to the strong and carefully worded language of the statute. When, for instance, Bray J. reasons that "It is a mistake to assume that to free one's heir from estate duty is necessarily an act done for his benefit," and that "it does not necessarily follow that the present Duke will reap the whole benefit if he escapes the payment of estate duty," the point of the provision appears to have been missed, namely, that escape is not permissible unless the incumbrance was created inter alia "wholly for the use and benefit," not of the present Duke, but of the late Duke, the grantor of the deed. And with reference to the decision of the learned judges in the Court of Appeal I think (1.) that it was too confined to the one item of the transaction as a purchase of a reversion without taking into account the fact appearing from other parts of the transaction that the reversion was purposely reduced to a shadow, and (2.) that too much stress was laid upon argument, possible but not put forward, as to fraud. The deeds make no attempt at concealment, but disclose quite openly the interrelation of the facts, deeds, and transactions which go to make up the scheme. To view these, so interrelated, as if they were in isolation, would be for me—and I speak of course only for myself—to shut out the light, to lose their true meaning, and to produce a risk of failure to get down to the reality and substance of the case. I think that the creation of these incumbrances was not for the use and benefit of the late Duke of Richmond and Gordon, but was simply part of a plan for saving death duties to his heirs. I do not think that the scheme was in this case accomplished without a contravention of the letter as well as a very plain violation of the spirit of the statute.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 26, 1909.

Solicitors: *Sir Francis Gore, Solicitor of Inland Revenue; Burch, Whitehead & Davidsons.*

Applied. BAILEY *v.* BULLOCK. [1950] 2 All E.R. 1167.

[HOUSE OF LORDS.]

H. L. (E.) 1909 *July* 26.

ADDIS . . . . . Appellant;

AND

GRAMOPHONE COMPANY, LIMITED . . Respondents.

Master and Servant — Breach of Contract — Tort — Wrongful Dismissal — Damages.

Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment:—

So *held* by Lord Loreburn L.C. and Lords James of Hereford, Atkinson, Gorell, and Shaw of Dunfermline (Lord Collins dissenting).

Order of the Court of Appeal (not reported, Feb. 5, 1909) reversed.

THE circumstances of this appeal in respect of the proposition stated in the head-note are related in the judgment of Lord Loreburn L.C. The other matters discussed throw no light upon that proposition and do not call for any report.

June 25, 28, 29. *Duke*, *K.C.*, and *Groser*, for the appellant. The appellant was wrongfully dismissed, and the jury in awarding damages were entitled to take into consideration the circumstances of the dismissal. There has been a development of the law in respect of the measure of damages. In *Marzetti* v. *Williams* (1) the action was for the dishonour of a cheque and the plaintiff was held entitled only to nominal damages, but Lord Tenterden C.J. said: "It is a discredit and therefore injurious in fact to have a draft refused payment for so small a sum." In *Rolin* v. *Steward* (2) the damages awarded in a similar case were "not nominal or excessive damages, but reasonable and temperate damages." *Emmens* v. *Elderton* (3) was a case of wrongful dismissal of a solicitor whom a company engaged "to retain and employ" at 100*l.* a year. It was held that the engagement was for not less than a year. In *French* v. *Brookes* (4) the engagement was for three years with a right to

(1) (1830) 1 B. & Ad. 415.
(2) (1854) 14 C. B. 595.
(3) (1853) 4 H. L. C. 624.
(4) (1830) 6 Bing. 354.

dismiss on one year's notice, and the damages were assessed at one year's salary. In *Maw* v. *Jones* (1) an apprentice who was engaged at weekly wages was summarily dismissed. The damages were held not to be confined to one week's wages. The measure of the damages is the whole loss sustained by the appellant, and the verdict of the jury in this case was reasonable.

Lush, *K.C.* (*Schiller* with him), for the respondents. There was in fact no wrongful dismissal, but if there were, the damages could not exceed the immediate pecuniary loss which the plaintiff sustained by the breach of contract. No damages can be awarded for loss of reputation or for hurt feelings or for the difficulty in finding employment caused by the dismissal. The case of a banker refusing to honour a cheque when he has funds is peculiar and not relevant to the point here raised. So with actions for breach of promise to marry. *Maw* v. *Jones* (1) is contrary to established principles and was wrongly decided.

Groser, in reply.

The House took time for consideration.

July 26. LORD LOREBURN L.C. My Lords, this is a most unfortunate litigation, in which the costs must far exceed any sum there may be at stake. A little common sense would have settled all these differences in a few minutes.

The plaintiff was employed by the defendants as manager of their business at Calcutta at 15*l.* per week as salary, and a commission on the trade done. He could be dismissed by six months' notice.

In October, 1905, the defendants gave him six months' notice, but at the same time they appointed Mr. Gilpin to act as his successor, and took steps to prevent the plaintiff from acting any longer as manager. In December, 1905, the plaintiff came back to England.

The plaintiff brought this action in 1906, claiming an account and damages for breach of contract. That there was a breach of contract is quite clear. If what happened in October, 1905, did not amount to a wrongful dismissal, it was, at all events, a breach

(1) (1890) 25 Q. B. D. 107.

H. L. (E.) 1909 ADDIS v. GRAMOPHONE COMPANY, LIMITED. Lord Loreburn L.C.

of the plaintiff's right to act as manager during the six months and to earn the best commission he could make.

When the action came to trial it was agreed to refer the matters of account to arbitration. The causes of action for breach of contract were tried by Darling J. and a jury. The jury found for the plaintiff in respect of wrongful dismissal 600*l.*, and 340*l.* in respect of excess commission over and above what was earned by the plaintiff's successor between October, 1905, and April, 1906.

The Court of Appeal by a majority held that upon their view of the facts there was (apart from the account which must be taken) no cause of action, and they entered judgment for the defendants.

As to the damages of 600*l.* for wrongful dismissal a variety of controversies arose. Did what happened entitle the plaintiff to treat the breach of contract as a wrongful dismissal? If yes, then did he elect to treat the contract of service as still continuing? Was it open to the defendants to raise the point having regard to the pleadings and the amendments to the pleadings, and the way the case was conducted at the trial, and the contents of the notice of appeal to the Court of Appeal? A subsidiary dispute was raised as to the way in which the case had been in fact conducted at the trial, as to which eminent counsel did not agree. A further controversy ensued, whether the 600*l.* was intended to include salary for the six months, or merely damages because of the abrupt and oppressive way in which the plaintiff's services were discontinued, and the loss he sustained from the discredit thus thrown upon him. And, finally, a question of law was argued, whether or not such damages could be recovered in law.

My Lords, it is difficult to imagine a better illustration of the way in which litigation between exasperated litigants can breed barren controversies and increase costs in a matter of itself simple enough.

To my mind it signifies nothing in the present case whether the claim is to be treated as for wrongful dismissal or not. In any case there was a breach of contract in not allowing the plaintiff to discharge his duties as manager, and the damages are exactly the same in either view. They are, in my opinion, the

salary to which the plaintiff was entitled for the six months between October, 1905, and April, 1906, together with the commission which the jury think he would have earned had he been allowed to manage the business himself. I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. An expression of Lord Coleridge C.J. has been quoted as authority to the contrary. (1) I doubt if the learned Lord Chief Justice so intended it. If he did I cannot agree with him.

If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment. The cases relating to a refusal by a banker to honour cheques when he has funds in hand have, in my opinion, no bearing. That class of case has always been regarded as exceptional. And the rule as to damages in wrongful dismissal, or in breach of contract to allow a man to continue in a stipulated service, has always been, I believe, what I have stated. It is too inveterate to be now altered, even if it were desirable to alter it.

Accordingly I think that so much of the verdict of 600*l.* as relates to that head of damages cannot be allowed to stand. As there is an additional dispute how much of it does relate to that head of damages, the best course will be to disallow the 600*l.* altogether, and to state in the order that plaintiff is entitled to be credited, in the account which is to be taken, with salary from October, 1905, to April, 1906.

As to the 340*l.* I think there was evidence on which the jury were entitled to find that the plaintiff could have earned more commission if he had been allowed to remain as manager.

In the result I respectfully advise your Lordships to order judgment for the plaintiff for 340*l.*, with a declaration that he is entitled to be credited, in the account now under investigation, with salary from October, 1905, to April, 1906, and with all

(1) "The plaintiff by reason of his being dismissed during his apprenticeship with a slur on his character naturally would experience a greater difficulty in getting employment elsewhere": 25 Q. B. D. at p. 108.

H. L. (E.) 1909

ADDIS v. GRAMOPHONE COMPANY, LIMITED.

Lord Loreburn L.C.

commission on business actually done during that period which he would have been entitled to receive if he had been acting as manager.

In regard to costs, both sides have raised points which ought not to have been raised, but I think the defendants acted oppressively in detaining the plaintiff's securities. The plaintiff has succeeded in recovering a substantial sum, and the judgment in his favour should be with costs here and below.

LORD JAMES OF HEREFORD. My Lords, I concur in the entirety of the judgment delivered by my noble and learned friend on the woolsack, but I wish to add a few words as to the claim for damages on the ground that there has been an aggravation of the injury in consequence of the manner of dismissal.

My Lords, that raises a question whether in an action of contract there can be such damages as those to which I have referred. The reason I wish to add one or two words is because I know that my noble and learned friend (Lord Collins) entertains the view that such damages are recoverable. As to that I must say that I regret I cannot join with him in that view. I have read the judgment of my noble and learned friend and endeavoured to give the fullest consideration to it, and yet I do not see, either from authority or from the reasoning which is to be found in that judgment, that such damages can be recovered in an action of contract.

My Lords, I may say if I had arrived at a different conclusion I should have been subjected to some feeling of remorse, because during many years when I was a junior at the Bar, when I was drawing pleadings, I often strove to convert a breach of contract into a tort in order to recover a higher scale of damages, it having been then as it is now, I believe, the general impression of the profession that such damages cannot be recovered in an action of contract as distinguished from tort, and therefore it was useless to attempt to recover them in such a case. That view, which I was taught early to understand was the law in olden days, remains true to this day. Therefore I feel bound to say, for the reason I have given, that I concur in that portion of the Lord Chancellor's judgment as well as the rest.

LORD ATKINSON. My Lords, I entirely concur with the judgment of my noble and learned friend on the woolsack. Much of the difficulty which has arisen in this case is due to the unscientific form in which the pleadings, as amended, have been framed, and the loose manner in which the proceedings at the trial were conducted.

The rights of the plaintiff, disembarrassed of the confusing methods by which they were sought to be enforced, are, in my opinion, clear. He had been illegally dismissed from his employment. He could have been legally dismissed by the six months' notice, which he, in fact, received, but the defendants did not wait for the expiry of that period. The damages plaintiff sustained by this illegal dismissal were (1.) the wages for the period of six months during which his formal notice would have been current; (2.) the profits or commission which would, in all reasonable probability, have been earned by him during the six months had he continued in the employment; and possibly (3.) damages in respect of the time which might reasonably elapse before he could obtain other employment. He has been awarded a sum possibly of some hundreds of pounds, not in respect of any of these heads of damage, but in respect of the harsh and humiliating way in which he was dismissed, including, presumably, the pain he experienced by reason, it is alleged, of the imputation upon him conveyed by the manner of his dismissal. This is the only circumstance which makes the case of general importance, and this is the only point I think it necessary to deal with.

I have been unable to find any case decided in this country in which any countenance is given to the notion that a dismissed employee can recover in the shape of exemplary damages for illegal dismissal, in effect damages for defamation, for it amounts to that, except the case of *Maw* v. *Jones*. (1)

In that case Mathew J., as he then was, during the argument, while counsel was urging, on the authority of *Hartley* v. *Harman* (2), that the measure of damages for the improper dismissal of an ordinary domestic servant was a month's wages and nothing more, no doubt interjected in the shape of a

(1) 25 Q. B. D. 107. (2) (1840) 11 Ad. & E. 798, 800.

H. L. (E.) 1909 — ADDIS v. GRAMOPHONE COMPANY, LIMITED. — Lord Atkinson.

question the remark, "Have you ever heard that principle applied to a case where a false charge of misconduct has been made?" But the decision was that the direction of the judge at the trial was right.

Now, what was the character of that direction? The defendant had power to dismiss his apprentice, the plaintiff, on a week's notice, and had also power to dismiss him summarily if he should shew a want of interest in his work. He dismissed the apprentice summarily without notice, assigning as a reason that he had been guilty of frequent acts of insubordination and that he had gone out at night without leave.

The judge at the trial told the jury that they were not bound to limit the damages to the week's notice he had lost, but that they might take into consideration the time the plaintiff would require to get new employment—the difficulty he would have as a discharged apprentice in getting employment elsewhere—and it was on this precise ground the direction was upheld. I do not think that this case is any authority whatever for the general proposition that exemplary damages may be recovered for wrongful dismissal, still less, of course, for breach of contract generally; but, such as it is, it is the only authority in the shape of a decided case which can be found upon the first-mentioned point.

I have always understood that damages for breach of contract were in the nature of compensation, not punishment, and that the general rule of law applicable to such cases was that in effect stated by Cockburn C.J. in *Engel* v. *Fitch* (1) in these words: "By the law of England as a general rule a vendor who from whatever cause fails to perform his contract is bound, as was said by Lord Wensleydale in the case referred to, to place the purchaser, so far as money will do it, in the position he would have been in if the contract had been performed. If a man sells a cargo of goods not yet come to hand, but which he believes to have been consigned to him from abroad, and the goods fail to arrive, it will be no answer to the intended purchaser to say that a third party who had engaged to consign the goods to the seller has deceived or disappointed him. The purchaser will be entitled to the difference between the contract price and the market price."

(1) (1868) L. R. 3 Q. B. 314, 330.

In *Sikes* v. *Wild* (1) Lord Blackburn says: "I do not see how the existence of misconduct can alter the rule of law by which damages for breach of contract are to be assessed. It may render the contract voidable on the ground of fraud or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself."

There are three well-known exceptions to the general rule applicable to the measure of damages for breach of contract, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer's to meet it, actions for breach of promise of marriage, and actions like that in *Flureau* v. *Thornhill* (2), where the vendor of real estate, without any fault on his part, fails to make title. I know of none other.

The peculiar nature of the first two of these exceptions justified their existence. Ancient practice upholds the last, though it has often been adversely criticized, as in *Bain* v. *Fothergill*. (3) If there be a tendency to create a fourth exception it ought, in my view, to be checked rather than stimulated; inasmuch as to apply in their entirety the principles on which damages are measured in tort to cases of damages for breaches of contract would lead to confusion and uncertainty in commercial affairs, while to apply them only in part and in particular cases would create anomalies, lead occasionally to injustice, and make the law a still more "lawless science" than it is said to be.

For instance, in actions of tort motive, if it may be taken into account to aggregate damages, as it undoubtedly may be, may also be taken into account to mitigate them, as may also the conduct of the plaintiff himself who seeks redress. Is this rule to be applied to actions of breach of contract? There are few breaches of contract more common than those which arise where men omit or refuse to repay what they have borrowed, or to pay for what they have bought. Is the creditor or vendor who sues for one of such breaches to have the sum he recovers lessened if he should be shewn to be harsh, grasping, or pitiless, or even insulting, in enforcing his demand, or lessened because the

(1) (1861) 1 B. & S. 587, at p. 594. (2) (1776) 2 W. Bl. 1078.
(3) (1874) L. R. 7 H. L. 158.

H. L. (E.) 1909 — ADDIS v. GRAMOPHONE COMPANY, LIMITED. — Lord Atkinson.

debtor has struggled to pay, has failed because of misfortune, and has been suave, gracious, and apologetic in his refusal? On the other hand, is that sum to be increased if it should be shewn that the debtor could have paid readily without any embarrassment, but refused with expression of contempt and contumely, from a malicious desire to injure his creditor?

Few parties to contracts have more often to complain of ingratitude and baseness than sureties. Are they, because of this, to be entitled to recover from the principal, often a trusted friend, who has deceived and betrayed them, more than they paid on that principal's behalf? If circumstances of aggravation are rightly to be taken into account in actions of contract at all, why should they not be taken into account in the case of the surety, and the rules and principles applicable to cases of tort applied to the full extent?

In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action: *Thorpe* v. *Thorpe*. (1) One of these consequences is, I think, this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.

I can conceive nothing more objectionable and embarrassing in litigation than trying in effect an action of libel or slander as a matter of aggravation in an action for illegal dismissal, the defendant being permitted, as he must in justice be permitted, to traverse the defamatory sense, rely on privilege, or raise every point which he could raise in an independent action brought for the alleged libel or slander itself.

In my opinion, exemplary damages ought not to be, and are not according to any true principle of law, recoverable in such an action as the present, and the sums awarded to the plaintiff

(1) (1832) 3 B. & Ad. 580.

should therefore be decreased by the amount at which they have been estimated, and credit for that item should not be allowed in his account.

Lord Collins. My Lords, the question which at the close of the argument I desired time to consider was whether in an action for wrongful dismissal the jury, in assessing the damages, are debarred from taking into their consideration circumstances of harshness and oppression accompanying the dismissal and any loss sustained by the plaintiff from the discredit thus thrown upon him. The jury in this case obviously did take these circumstances into consideration, for they assessed the damages at 600*l*. The contention of the defendants is that the damages must be limited to the salary to which the plaintiff was entitled for the six months between October, 1905, and April, 1906, together with the commission which the jury should think he would have earned had he been allowed to manage the business himself; that the manner of the dismissal itself has never been allowed and ought not to be allowed to influence damages in this kind of case. This contention goes the length of affirming that in cases of wrongful dismissal it is beyond the competence of a jury to give what are called exemplary or vindictive damages, and it was this point that I desired to consider further.

No English case was cited which in terms decides this point against the plaintiff, and I have been unable to find one myself, though I am aware that Mr. Sedgwick, in his treatise on Damages (8th ed.), contends for that view. It is, however, quite clear, I think, and Mr. Sedgwick apparently does not dispute it, that at one time it was competent for juries to give such damages. "In one case as late as the reign of James the First," he says at s. 19, "it is said 'the jury are chancellors' and they can give such damages as 'the case requires in equity' as if they had the absolute control of the subject." At ss. 348, 349, he goes on, "Until comparatively recent times juries were as arbitrary judges of the amount of the damages as of the facts." "This principle applied as well to actions of contract as of tort." "Even as late as the time of Lord Mansfield it was possible for counsel to state the law to be that the Court cannot measure the ground on which the jury

H. L. (E.) 1909 ADDIS v. GRAMOPHONE COMPANY, LIMITED. Lord Collins.

find damages." He says, in s. 351, in breach of promise of marriage cases the jury were told that they could give damages "for example's sake to prevent such offences in future." He says, in s. 352, vindictive damages or smart money could be given whether the form of action were trespass or case. At s. 354, on the right to give such damages, he says: "The doctrine is to be supported mainly on the grounds of authority and convenience. The historical facts shew that it has its roots in that jealousy of the exercise of arbitrary and malicious power to which the jury in our system of law has always been so keenly alive, and if it is an anomalous survival of a part of the old rule that the jury were judges of the damages, it must be inferred that it has survived because of its inherent usefulness."

Having thus explained and vindicated the right of juries to give exemplary damages, "for example's sake and to prevent such offences in future," he nevertheless in other parts of his work seeks to put upon it an arbitrary and illogical limitation by confining it to actions *in form of tort*, as though a breach of contract, which of course is in itself an actionable wrong, might not be committed with accompanying circumstances just as deserving the reprobation of a jury as those which might accompany the commission of a trespass. The rule with regard to remoteness of damage is precisely the same in actions of contract or of tort: see Pollock on Torts, 8th ed., p. 558, citing Brett M.R. in the *Notting Hill Case*. (1)

But it is from the standpoint of a difference in principle in the measure of damages in cases of contract and of tort that he ventures to impugn the position taken up by the late Mr. Chitty in the early editions of his well-known work on Contracts, a position which has been adopted by all subsequent editors, and is again asserted in the last (the 14th) edition of 1904. In the 1834 edition Mr. Chitty says: "There are instances in which the defendant may be regarded in the light of a wrong-doer in breaking his contract, and in such cases a greater latitude is allowed to the jury in assessing the damages." And he cites *Lord Sondes* v. *Fletcher* (2), decided in 1822. There the plaintiff had presented the defendant to the living of Kettering,

(1) (1884) 9 P. D. 105. (2) (1822) 5 B. & Al. 835.

taking from him a bond to resign it when either of two named persons should be capable of taking the same. The defendant, although requested, refused to resign. The defendant's life interest was worth ten years' purchase. The life interest of one of the two persons named, whom the plaintiff intended to appoint, was worth fourteen years' purchase. At the trial before Abbott C.J. the jury found a verdict for the latter amount. On motion for a new trial, on the ground that the measure of damages was the amount by which the plaintiff was prejudiced in the value of the advowson, i.e., the value of the defendant's life interest, and that in estimating the annual value of the living the curate's stipend ought to have been deducted, the Court held that the defendant, having entered into a bond to do a particular thing which he had refused to do, was a wrong-doer, and that he was not to be permitted to estimate the value of the living as if he were the purchaser of it, and that they were not prepared to say that the jury had formed a wrong estimate of the damages. The judges who usually sat in banc at that time were Abbott C.J. and Bayley, Holroyd, and Best JJ. Thus we have the opinion of four eminent English judges as late as 1822, notwithstanding the fact that in form the action was for breach of contract only, sanctioning the award of exemplary damages.

It is true that Mr. Sedgwick impugns Mr. Chitty's position, but he has to admit that the Courts of North and South Carolina, whose high authority he acknowledges, have laid the law down in a sense contrary to his (Mr. Sedgwick's) contention. Again, as late as 1849, on a question whether the damages given by a jury in a case of wrongful dismissal were excessive, no less distinguished a judge than Maule J., with whose judgment Cresswell J. and Wilde C.J. expressly concurred, said: "I also think there is no ground for saying the damages were miscomputed. It must be borne in mind that embezzlement was imputed to the plaintiff." (1) Doubtless there are other dicta to the same effect scattered through the reports, some of which were cited by Mr. Duke; indeed, it could hardly fail to be so in view of the authorities which I have cited and the

(1) *Smith* v. *Thompson*, (1849) 8 C. B. 44, at p. 61.

H. L. (E.) 1909

ADDIS v. GRAMOPHONE COMPANY, LIMITED.

Lord Collins.

absence of any decided case to the contrary; at the same time it was quite possible that the strong opinion of so distinguished a text-writer as Mr. Sedgwick might lead casual readers to forget that the law of England was once clearly established to the contrary. But it does so happen that the only authority in recent times on the point is the case of *Maw* v. *Jones* (1), decided in 1890, which in terms decides that a false charge may aggravate the damages in a case of wrongful dismissal.

This case has the authority of Manisty J., as well as of Lord Coleridge C.J. and Mathew J., by whom his ruling to that effect was upheld. Lord Coleridge C.J. pointed out that dismissal with an imputation might well be thought by a jury to hurt the plaintiff's prospects of finding another situation, and on that ground alone might give a legal claim to consequential damages within the ordinary rule.

Counsel for the defendant argued that this case stood alone and was quite an exception in our law and ought to be overruled; and the like observation was made as to the exceptional character of actions for breach of promise of marriage where it is admitted that such damages may be properly given. Dealing with this incident of breach of promise cases, Sir Frederick Pollock in his Treatise on the Law of Torts, 8th ed., 1908, says at p. 560, "like results might conceivably follow in the case of other breaches of contract accompanied with circumstances of wanton injury or contumely"; and see the observations of Willes J. in *Bell* v. *Midland Ry. Co.* (2) But when the law of damages is traced backwards, it will be found that the so-called exceptions, including that of dishonoured cheques, are merely recurrences to the old rule, which, it may be through the deference paid by our own text-writers to Mr. Sedgwick's opinion, has been sometimes forgotten or ignored. But, for the reason I have given, I think we are not bound to disallow such damages in this case, and I am not disposed, unless compelled by authority to do so, to curtail the power of the jury to exercise what, as Mr. Sedgwick points out, is a salutary power, which has justified itself in practical experience, to redress wrongs for which there may be, as in this case, no other remedy. Such discretion, when

(1) 25 Q. B. D. 107. (2) (1861) 10 C. B. (N.S.) 287, at p. 307.

exercised by a jury, would be subject to the now unquestioned rights of the Courts to supervise, just as is done every day, where the form of action is tort. That a trespass carrying with it an imputation may be the subject of exemplary damages swelled by the fact of the imputation was decided by Lord Ellenborough in *Bracegirdle* v. *Orford* (1), overruling the contention that the imputation could only be brought into consideration as the subject for a separate count for slander.

In all other respects I agree in the opinion of the Lord Chancellor.

Lord Gorell. My Lords, in this case the legal point arises whether in the plaintiff's action for breach of contract to employ him the defendants can be made liable, in addition to damages for the loss to the plaintiff of the benefit of the contract, for damages for the manner in which the contract has been put an end to. The general rule is clear that damages in contract must be such as flow naturally from the breach, or such as may be supposed to have been in the contemplation of the parties as the result of the breach. The latter branch of the rule is inapplicable to the facts of this case, for it was not even suggested that there were any consequential damages within the contemplation of the parties. Under the first branch of this rule the plaintiff recovers the net benefit of having the contract performed. He is therefore to be put in the same position as if the contract had been performed. If it had been performed, he would have had certain salary and commission. He loses that, and must be compensated for it. But I am unable to find either authority or principle for the contention that he is entitled to have damages for the manner in which his discharge took place. According to my view, none of the cases which counsel for the appellant cited established the proposition for which he contended.

The case of *Maw* v. *Jones* (2), which was relied on, does not, when examined, support the contention. The plaintiff has attempted to suggest that the manner of his dismissal has cast a slur upon his character, and has really endeavoured to claim damages for defamation and to turn the action for the loss of

(1) (1813) 2 M. & S. 77. (2) 25 Q. B. D. 107.

H. L. (E.) 1909

ADDIS v. GRAMOPHONE COMPANY, LIMITED.

Lord Gorell.

the benefit of the contract into an action of tort, with the result of attempting to give the jury a discretion uncontrolled by the true consideration, namely, what is the money loss to the plaintiff of losing the benefit of the contract?

I consider, further, that there was nothing in the manner of the plaintiff's dismissal which was different in any legal sense from what would have been the case if his employment had been terminated at the end of the six months. At that time his authority as agent and at the bank would have come to an end and been notified, and his successor would take his place. This was done six months sooner than the defendants had a right to act.

In my opinion the verdict for 600*l.* cannot in the circumstances stand.

With regard to the 340*l.* for extra commission, the plaintiff's right to this depends upon whether there was evidence which the jury were entitled to consider to shew that had he remained agent for the six months he would have been able to earn more profits for the agency than were actually earned. Having studied the evidence with care, I have come to the conclusion that there was some evidence upon the point, and I think the jury were entitled to act upon it if they thought fit.

As to the remaining points I do not think it necessary to add anything to the observations of the Lord Chancellor, and I concur in the judgment which he proposes.

LORD SHAW OF DUNFERMLINE. My Lords, it is impossible to deny the impressiveness and value of the citation of authority made by my noble and learned friend Lord Collins, and I am much moved by his definite opinion that the verdict is consistent with the practice of the law of England. But as the rest of your Lordships do not agree that the matter is concluded by authority or practice, I am willing and free to state my reckoning of the question as one of principle. So considered, the matter appears to me to stand in the following position. There can be no doubt that wrongful dismissal may be effected in circumstances and accompanied by words and acts importing an obloquy and causing an injury, any reasonable estimate of which in money

would far outreach the balance of emolument due under the contract. This is within the range of ordinary as well as professional experience. And I admit the highest regard for that judicial opinion which leans towards such a perfecting of the legal instrument as to enable it to provide a remedy in complete equation with the wrong suffered. There, however, my concurrence with that opinion stops, and I cannot carry it forward to what, in my view, would be a disregard of the limitations of the instrument itself. The present type of case—wrongful dismissal—provides a convenient illustration of both aspects of the position. Suppose, my Lords, that slander or libel accompanies the dismissal, nothing, as I understand, is here decided to the effect that the slander or libel, which is cognizable by law as a good and separate ground of action, suffers either merger or extinction by reason of proceedings in respect of the breach of contract which such slander or libel accompanied. The law still provides a remedy. This seems perfectly just and very elementary, and I only state it because judges and text-writers appear not infrequently to have forgotten it. In the very decisions cited by Lord Collins in England the award of damages in respect of breach of the contract of service seems to have been improperly inflated by allowances made for "false charges," even a charge of embezzlement. I looked for possible assistance on this subject to the law of Scotland, but the same fallacy has taken some root in that country, a most eminent text-writer remarking, "In aggravated circumstances, e.g., where the master has calumniated the servant's character or injured his reputation, and so prevented his getting a new situation, damages to a much greater amount (than the whole emoluments, &c., due under the contract) might be given." (1) My Lords, it is sufficient for me in answer to such dicta to repeat that slanders, and the like, which are in themselves cognizable by law as grounds of action, do not undergo the merger indicated, a merger which might produce prejudice and confusion; nor do they suffer extinction; the remedies therefore remain unaffected, and also separately available at law. I may add that I do not think that the citation from Pothier made by the last-named author strengthens his position,

(1) Fraser, Master and Servant, 2nd ed., p. 135.

H. L. (E.) 1909

ADDIS v. GRAMOPHONE COMPANY, LIMITED.

Lord Shaw of Dunfermline.

for when that great jurist says that, in addition to payment to the servant of the "whole year" of his services, the master "peut être condamné aux dommages et intérêts du domestique," he may only be referring to those commission perquisites and allowances which go to make up the full emoluments of the servant.

There remains, however, my Lords, a class of cases in which the injury accompanying the dismissal arises from causes less tangible, but still very real, circumstances involving harshness, oppression, and an accompaniment of obloquy. In these cases, unhappily, the limitations of the legal instrument do appear; these cases would not afford separate grounds of action because they are not cognizable by law. The very instance before your Lordships' House may afford an illustration. Here a successor to the plaintiff in a responsible post in India was appointed in this country, without previous notice given by the defendants; the successor enters the business premises to take, by their authority, out of the hands of the plaintiff those duties with which the defendants have by contract charged him, and he does so almost simultaneously with the notice of the defendants bringing the contract to a sudden termination; while, even before this notice reached his hands, the defendants' Indian bankers had been informed of the termination of the plaintiff's connection with and rights as representing their firm. Undeniably all this was a sharp and oppressive proceeding, importing in the commercial community of Calcutta possible obloquy and permanent loss. Yet, apart from the wrongful dismissal, and on the hypothesis that the defendants are to be held liable in the full amount of all the emoluments and allowances which would have been earned by the plaintiff but for the breach of contract, there seems nothing in these circumstances, singly or together, which would be recognized by the law as a separate ground of action. If there should be, it will, on the principle I have referred to, remain; but if there be not, I cannot see why acts otherwise non-actionable should become actionable or relevant as an aggravation of a breach of contract which, ex hypothesi, is already fully compensated. A certain regret which accompanies the conclusion

which I have reached on the facts of this particular case is abated by the consciousness that the settlement by your Lordships' House of the important question of principle and practice may go some length in preventing the intrusion of not a few matters of prejudice hitherto introduced for the inflation of damages in cases of wrongful dismissal and now definitely declared to be irrelevant and inadmissible on that issue.

I concur in the judgment proposed by the Lord Chancellor.

Order of the Court of Appeal reversed and judgment entered for the appellant for 340*l.*, *with a declaration that the appellant is entitled to be credited in the account with salary from October*, 1905, *to April*, 1906, *and with all commissions earned by the Calcutta agency of the respondents during that period and payable to the appellant under the agreement, and that the account remains to be taken in this action: the respondents to pay the appellant's costs here and below other than the costs of taking the account.*

Lords' Journals, July 26, 1909.

Solicitors: *Wansey, Stammers & Co.; Broad & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1909 *July* 27.

CONWAY (PAUPER) . . . . . APPELLANT;

AND

WADE . . . . . RESPONDENT.

Trade Union—Workman—Interference with Employment—Inducing Dismissal by Threats—"Trade Dispute"—"Contemplation or furtherance of a Trade Dispute"—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3; *s.* 5, *sub-s.* 3.

In an action for damages for inducing the plaintiff's employers to dismiss him, by threats that otherwise the union men would cease working, the defence was that the acts (if any) of the defendant were not actionable as provided by s. 3 of the Trade Disputes Act, 1906. The jury found that there was no trade dispute existing or contemplated by the men, and that the defendant's threats were uttered in order to compel the plaintiff to pay a union fine and to punish him for not paying it and to prevent him from getting or retaining employment, and they gave the plaintiff damages:—

Held, that there was as a matter of fact evidence to justify the findings of the jury.

Decision of the Court of Appeal reversed and decision of Channell and Sutton JJ., [1908] 2 K. B. 844, 848, restored upon the above ground.

Observations on the words "contemplation or furtherance of a trade dispute" in s. 3 of the Trade Disputes Act, 1906.

THE facts material to this appeal are stated in the judgments in this House and in the report of the decisions below.

April 26, 27. *Avory, K.C.*, and *Joel* (*Drysdale Woodcock* and *G. Considine O'Gorman* with them), for the appellant. The jury were entitled to express their opinion on the facts, and the verdict they found was warranted by the evidence and was certainly not perverse. A verdict can only be set aside if it is perverse or such as no reasonable man could have found. There is no allegation of misdirection or non-direction by the county court judge. The jury saw the witnesses and were entitled to act upon their own opinion and to disbelieve the defendant's evidence. He seems to have acted either from jealousy or vindictiveness, or from a desire to get the old fine paid. If he only wished to get the fine paid there was no dispute

within the meaning of the Act. The word must mean a present dispute, but there was no dispute either present or past. The appellant had never refused to pay the fine, which in fact was never brought to his attention. It was not for the plaintiff to prove that there was no dispute; it was for the defendant to establish affirmatively that there was an existing dispute, and this was not done. The Court of Appeal were not entitled to go behind the findings of the jury. Sect. 3 of the Trade Disputes Act provides that an act done in contemplation or furtherance of a trade dispute shall not be actionable "only" on the ground that it induces to a breach of contract or is an interference with trade or certain rights of others. There may be other grounds. If, for example, one man assaulted another, the Act would have no application. The section cannot mean that a man may do anything he likes, if it is in connection with or in contemplation of any possible dispute in the future. It is not contested that by the common law the defendant's conduct was actionable. This is clear from *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*. (1) An Act which like that of 1906 restricts the common law right of action must be strictly and narrowly construed.

C. A. Russell, K.C., and *Edward Shortt*, for the respondent. The finding of the jury that there was no dispute is contrary to the evidence. The jury were no doubt at liberty to believe or disbelieve particular witnesses, but not to reject all the evidence and act on their own view of the case. The words of the Act are general and comprehensive. Any difference or dissension among the men in connection with their employment constitutes a "dispute" within the meaning of s. 3. The evidence shews that the men were unwilling to work with the appellant and would leave if he were allowed to stay on. The respondent had, it is true, no authority to act in the matter; but he was the men's mouthpiece to convey their views to Conway. Manifestly trouble was imminent, and the Act of 1906 excludes from the consideration of the Courts an act done "in contemplation . . . . of a trade dispute." Such a case is within the scope of the statute.

(1) [1903] 2 K. B. 600.

H. L. (E.) 1909 CONWAY v. WADE.

Apart from the statute Wade was guilty of no actionable wrong towards Conway. The situation is precisely the same as that which existed in *Allen* v. *Flood*. (1) Men have a right to tell their employers that they will not be fellow servants with such or such a man. Motive, as several noble and learned Lords said in *Allen* v. *Flood* (1), is immaterial. Wade or Mullen may have been actuated by pure malice towards Conway. It makes no difference whether they were or not. There was no unlawful act; no threat or coercion or conspiracy. In both aspects, under the Act of 1906 and on the merits apart from the Act, the decision of the Court of Appeal was right.

Avory, K.C., in reply. It was not argued in the Court of Appeal that there were no threats or coercion. Threats are not necessary, if coercion is employed, to give a right of action. It is sufficient if there be an intention to injure: *Giblan's Case*, per Romer L.J. (2) Lord Macnaghten said in *Quinn* v. *Leathem* (3): "It is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference." Wade was a delegate of the union, and Baines treated his communication as an order that Conway should be got rid of.

The House took time for consideration.

July 27. LORD LOREBURN L.C. My Lords, in my opinion the order appealed from should be reversed. This action was tried before Judge O'Connor at South Shields. Your Lordships have not that learned judge's summing up before you, but no kind of objection was raised to it. A series of questions were put to the jury by desire of counsel on both sides, and duly answered, so that we have all the material facts either admitted or found.

If the jury are right, what happened was as follows. The plaintiff Conway was in employment under the firm of Readhead & Sons. The defendant Wade, in order to compel the plaintiff to pay a fine due to the trade union and to punish him for not paying it, procured Messrs. Readhead & Sons' foreman to dismiss him, by threats that unless they dismissed the plaintiff the

(1) [1898] A. C. 1. (2) [1903] 2 K. B. 600, at p. 619.
(3) [1901] A. C. 495, 510.

union men in their service would leave off work, which was not true. The plaintiff had to quit his employment in consequence, and so suffered damage. So far I own that from the evidence, as it appears on paper, I am not sure I should have myself found all those things. But I am quite sure that the jury who heard the witnesses are better judges on such a subject than I can be. The defendant must be taken to have acted as a mischief-maker in order to injure the plaintiff from unworthy motives, accompanied by threats that he would cause Messrs. Readhead's men to come out, in a matter with which he had no concern; for it is admitted that, though district delegate of the union, he was acting without authority. The only defence really made to this action, beyond a denial of these facts, was the 3rd section of the Trade Disputes Act, 1906, and it was upon this ground alone that the Court of Appeal decided the case.

Manifestly it is essential to any defence under this section for the defendant to shew that the act complained of was done in contemplation or furtherance of a trade dispute. Otherwise the section cannot possibly apply. Now the jury in addition to their other findings have explicitly found that there was no trade dispute either existing or contemplated by the men, which has been properly taken to mean that the act complained of was not done in contemplation or furtherance of a trade dispute. Judge O'Connor was satisfied with this verdict, as was the Divisional Court. In the Court of Appeal, however, the learned judges found this fact the other way, and thereupon entered judgment for the defendant.

My Lords, knowing as I do how averse the Court of Appeal is to usurping the functions of a jury, I conclude that the learned judges were enabled to bring this case within this section by taking a different view of the section from that which I take. For the verdict of the jury seems, I believe to all your Lordships, a reasonable enough conclusion from the evidence, and one which it is our duty to support.

"Trade dispute" is a familiar phrase in earlier Acts of Parliament, and is defined in this Act. I do not know that the definition is of much assistance. If this section is to apply there must be a dispute, however the subject-matter of it be defined.

H. L. (E.) 1909 CONWAY v. WADE. Lord Loreburn L.C.

A mere personal quarrel or a grumbling or an agitation will not suffice. It must be something fairly definite and of real substance. If this be so, I am then so far from thinking it impossible to doubt there was a trade dispute that I actually think there was none, if, indeed, my opinion, founded on printed evidence, is worth much. The law, however, prefers the opinion of a jury, and the jury have in this case come to the same conclusion.

I prefer to say nothing as to some opinions expressed in the Court of Appeal with regard to this Act and the motives supposed to have actuated those who passed it. If the Act is to be interpreted or applied in the view that stirring up strife is the aim and object of any part of it, then indeed it will be a fountain of bitter waters. But some opinions were also expressed as to a matter on which the Court of Appeal has both authority and jurisdiction, namely, the true meaning of the words "in contemplation or furtherance." I regret that I cannot altogether agree with what was said.

It is necessary to consider how the law stood before 1906. With the liability of trade union funds and the law of conspiracy we are not here concerned. But it is material to see in what circumstances an individual could be sued for inducing some one not to employ or not to serve another. For that is the point arising in this appeal, and to that I will confine myself.

I think on that point the law stood as follows. If the inducement was accompanied by violence or threats (always remembering that a warning is one thing and a threat is another) there was a good ground of action. I next suppose there was no violence and no threat, and yet the inducement involved a breach of contract. There also it was established, after a long controversy beginning with *Lumley* v. *Gye* (1) in 1853, that an action could be maintained, unless at all events some sufficient justification could be made good. But suppose one person simply induced some one not to employ another or not to serve another, without violence or threat or breach of contract, would an action lie, and in what circumstances, in such a case? I believe there has not been an exhaustive answer to that question.

(1) (1853) 2 E. & B. 216.

The further difficulty arises, what is a sufficient justification? Is it supplied by self-interest, or by trade competition, or by what other condition or motive? No answer in general terms has ever been given, and perhaps no answer can be given. A parallel difficulty arises where the inducement is by two or more persons acting together.

It is always a source of danger when the law is uncertain. And inasmuch as industrial warfare unhappily takes too often the form of strikes and lock-outs, and inducing other persons to co-operate in them, uncertainty as to the weapons allowed by the law is likely to cause more alarm than perhaps may be justified. Certainly some dicta in recent cases gave rise to an apprehension that it might be held unlawful for men to induce others to join them in a strike, especially in what is called a secondary strike; for the essence of a strike consists of inducing others not to serve particular employers, or, as the case may be, any employers in a particular trade. I believe that, stated quite generally, was the state of the law preceding the Trade Disputes Act of 1906, so far as it was settled, and that the uncertainties were as I have described.

The 3rd section, which purports to deal with this point, is as follows: "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Let me see how this alters the pre-existing law. It is clear that, if there be threats or violence, this section gives no protection, for then there is some other ground of action besides the ground that "it induces some other person to break a contract," and so forth. So far there is no change.

If the inducement be to break a contract without threat or violence, then this is no longer actionable, provided always that it was done "in contemplation or furtherance of a trade dispute." What is the meaning of these words I will consider presently. In this respect there is a change.

If there be no threat or violence, and no breach of contract,

H. L. (E.) 1909

CONWAY v. WADE.

Lord Loreburn L.C.

and yet there is "an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills," there again there is perhaps a change. It is not to be actionable, provided that it was done "in contemplation or furtherance of a trade dispute."

So there is no longer any question in such cases, whether there was "sufficient justification" or not. The condition contained in these words as to trade dispute is made sufficient.

I come now to the meaning of the words "an act done in contemplation or furtherance of a trade dispute." These words are not new in an Act of Parliament; they appear in the Conspiracy and Protection of Property Act, 1875. I think they mean that either a dispute is imminent and the act is done in expectation of and with a view to it, or that the dispute is already existing and the act is done in support of one side to it. In either case the act must be genuinely done as described, and the dispute must be a real thing imminent or existing. I agree with the Master of the Rolls that the section cannot fairly be confined to an act done by a party to the dispute. I do not believe that was intended. A dispute may have arisen, for example, in a single colliery, of which the subject is so important to the whole industry that either employers or workmen may think a general lock-out or a general strike is necessary to gain their point. Few are parties to, but all are interested in, the dispute. If, however, some meddler sought to use the trade dispute as a cloak beneath which to interfere with impunity in other people's work or business, a jury would be entirely justified in saying that what he did was done in contemplation or in furtherance, not of the trade dispute, but of his own designs, sectarian, political, or purely mischievous, as the case might be. These words do, in my opinion, in some sense import motive, and in the case I have put a quite different motive would be present. If the jury so found, the meddler would not be protected by the 3rd section of the Act of 1906. But I have no doubt that an act done with a single eye to the dispute, "in contemplation or in furtherance" of it, would not be actionable on any of the grounds specified in the section.

In regard to a peacemaker, who in the opinion of the Court of Appeal is not protected under this section, he requires no protection. A peacemaker is not under the laws of this country, and never has been, held liable in an action.

As for the present appeal, I move your Lordships to allow it with costs here and below.

LORD MACNAGHTEN. My Lords, I quite agree with the conclusion at which my noble and learned friend has arrived and with the reasons on which that conclusion is based.

LORD JAMES OF HEREFORD. My Lords, in order to arrive at a conclusion upon this appeal your Lordships must determine two questions of fact.

The first is, were the acts complained of the outcome of a trade dispute within the meaning of the 3rd section of the Act of 1906? In my opinion the jury correctly found: (1.) that a trade dispute did not exist and was not contemplated by the men; (2.) that the men did not communicate any such existence or contemplation of a trade dispute to the defendant; (3.) that the defendant did not act in consequence of any such communication.

I see no ground for setting aside those findings; on the contrary, if I had been a member of the jury, so far as I can judge, I should have been of the same opinion.

The circumstances given in evidence seem to shew that the complaint in respect of the non-payment of the fine was not a genuine complaint, but was put forward as a pretence under which the plaintiff might be deprived of the position he had been promoted to. It seems that the fine referred to had been imposed eight years before the events in question, and that it had never been enforced, although the plaintiff had intermittently been a member of the union and had been received as such, and apparently no dispute existed as to his liability to pay the fine. On September 23, 1907, the plaintiff entered upon employment at Readhead & Sons' works as an ordinary workman. On the 25th the defendant saw the plaintiff's receipt for the union payment and said, "It is all right, go to work." Up to this time it seems clear that no trade dispute existed. But within a few days

H. L. (E.) 1909

CONWAY v. WADE.

Lord James of Hereford.

the plaintiff was appointed a chargeman with an advance of wages from 28*s.* to 33*s.* per week.

I come to the conclusion that it was the preference of the plaintiff that caused certain of his fellow workmen to desire to get rid of him, and with that object to put the defendant in motion, who could speak with apparent authority to the plaintiff's employers. Accepting this duty, the defendant took the old forgotten incident of non-payment out of stock and represented it as a ground of complaint against the plaintiff.

At any rate, I think that this inference might well be drawn by the jury, and, if such result is correct, I submit no sufficient ground exists under which your Lordships can come to the conclusion that this finding should be overruled.

The second question that has to be determined is, Did the defendant use threatening language to the plaintiff's employers with the intention of preventing the plaintiff retaining his employment? The jury have found affirmatively that the defendant made use of such language with the intention alleged.

The question involved is, of course, one of fact. The words used may be without controversy, but the sense in which they are used may have to be determined not only by the mere words, but by many surrounding circumstances—even those of voice and gesture. In this case the defendant's threat to the plaintiff that he would not be allowed to work shews, it seems, that the defendant's position was one of hostility to the plaintiff.

His interference was caused by a desire that the plaintiff should not continue in Readhead's employment. There was no apparent reason why the defendant should act as a gratuitous adviser in the interests of the plaintiff's employers. And if he did not interfere as an adviser, it seems apparent he must have done so in a spirit of hostility to the plaintiff, and with the object of depriving him of his employment, in which effort he succeeded.

I therefore think that a good cause of action was established, and that the defendant is not protected by the 3rd section of the Act of 1906.

The appeal therefore succeeds.

LORD ATKINSON. My Lords, it was, in my opinion, perfectly competent for the jury in this case, as reasonable men, to have come to the conclusion, on the evidence, that the whole story put forward by the defendant as to the existence amongst the fellow workmen of the plaintiff of an objection to his presence, and a resolve to leave the employment if he was to continue in it, was a fabrication. There are two circumstances in the case which, to my mind, point in that direction—first, the fact that none of the plaintiff's fellow workmen ever suggested to him that any such objection or resolve existed ; and, second, the fact that neither in the letter of the defendant of October 17, 1907, nor in that of his solicitor of the 21st of the same month, is any reference whatever made to either of these matters.

Messrs. Hannay & Stuart, the plaintiff's solicitors, had in their letter of October 17, the receipt of which the defendant acknowledged, distinctly charged him with unlawfully and maliciously procuring the plaintiff's dismissal from his work at Readhead's yard, and also with having informed the plaintiff that he (the defendant) would stop the former's getting work elsewhere. There is not in the correspondence any denial of the truth of either of these charges, nor, stranger still, any statement to the effect that the defendant, as he now contends, only communicated to Baines, the manager of the works, the resolve the workmen of the firm had already formed, or that he had merely remonstrated in a friendly way with or advised their manager. That story was reserved for the trial, and the fact that it was so reserved might, in my view, be most reasonably regarded as throwing grave suspicion upon it.

It appears to me to be clear, and, indeed, I hardly think it is seriously disputed, that the words used by Wade to Baines are capable of conveying a threat, and that the jury were justified as reasonable men in finding, as they did, that the words did convey a threat. I do not gather from the judgments of the learned Lords Justices that they did not think there was evidence sufficient to support this finding, as well as the two findings (1.) that what Wade did prevent, and was intended to prevent, was the plaintiff's getting or retaining employment, and (2.) that this was done in order to compel the plaintiff to pay the arrears of the

H. L. (E.) 1909 CONWAY v. WADE. Lord Atkinson.

fine he owed, and was also (3.) to punish him for not having theretofore paid it. I gather that the Court of Appeal were of opinion that, apart from the Trade Disputes Act of 1906, the plaintiff would on these findings have been entitled to a verdict, notwithstanding that the defendant did not conspire with another, or with others, but merely acted alone. If so, I concur with them.

If, however, the jury were of opinion, as apparently they were, that the above-mentioned story put forward by the defendant was a fabrication, I fail to see how their first finding, that no trade dispute existed among the men, or was contemplated by them, is perverse, provided it means, as I think it must be taken to mean, a dispute between the men employed at Readhead's works at the time Wade spoke to Baines.

It is quite true that Baines, having, in his evidence in chief, said that before he saw Wade there was, as far as he knew, no reason to stop Conway, and also that "he knew of no dispute in Readhead's works in October in the nature of a trade dispute, and none between employer and workman," on his cross-examination stated that Linney "said something to him about Conway," that there was a money dispute, and that "Linney said that if Conway was kept on the men would stop work." He did not mention when this last-mentioned conversation took place; but, even assuming that it took place before his interview with Wade, Baines was obviously a witness friendly to the defendant. He had acted in obedience to the tyrannical requirements of the latter. He had gone to the Adam and Eve lodge and signed a paper "because he was in a hurry to get back." It was quite competent for the jury to accept the other portions of Baines' evidence, fortified as they are by the evidence of the plaintiff, and to reject this statement extracted in an obviously friendly cross-examination.

It would appear to me, therefore, that the finding of the jury on the first question, if taken in the sense I have indicated, can well be supported by the evidence. It is not suggested that any trade dispute existed amongst, or was contemplated by, any workmen other than the workmen employed at Readhead's works, nor is it suggested that any trade dispute was contemplated by any employers of workmen other than those interested in this firm. A trade dispute may, no doubt, have been

contemplated by Wade at the time he interfered, as the intended and probable result of his own action. That, no doubt, appears on the evidence of the plaintiff himself. But Wade was an outsider; he was neither an employer nor a workman; he was a mere intermeddler, with no authority from any trade union body to act as he did.

One of the questions to be decided, therefore, is whether s. 3 of the Trade Disputes Act, 1906, applies to a non-existing dispute, not arranged for, intended to be brought about, regarded as imminent or likely to occur, or even thought of by any employer or any workman, or by any one save an intruder of this kind at the time he intervenes. In order that a dispute may be a trade dispute at all, a workman must be a party to it on each side, or a workman on one side and an employer on the other, and an act done in furtherance of a dispute is not protected unless the dispute be one of that character. It is help, assistance, or encouragement to such a dispute that the Legislature apparently had in view when it used the words "in furtherance." Must it not, when it uses, in juxtaposition with these words, the words "in contemplation," be held to have had in view a dispute which must, at the time the act it designed to protect was done, have been, at all events, "thought of" by some person who should be a party to it when it arose, if it was to be a trade dispute within the meaning of the Act? Otherwise an intruder, such as Wade, would be shielded from liability simply because of his own mental outlook, however peculiar that outlook might be, and however unknown to, or unshared in by, others.

From the illustration taken by the Master of the Rolls and the observations made by the Lords Justices I would gather that this latter is their view. If I am right in thinking so, then with all respect I must say I am unable to concur with them. Just as the statute is designed to protect acts in the nature of aid, assistance, help, and encouragement rendered to the disputants of the kind described, on one side or the other of a dispute which had actually arisen, when it uses the words "in furtherance of," so I think the Legislature must be held, where it uses the words "in contemplation of," to have meant them to

H. L. (E.) 1909 CONWAY v. WADE. Lord Atkinson.

apply to aid, assistance, help, or encouragement given to the same persons when those persons were arranging for, designing, or meditating a dispute which by their participation in it when it did arise would become a "trade dispute."

It is impossible to suppose, I think, that the Legislature ever intended that where perfect peace prevailed in any factory or establishment, and an intruder, a mere mischief-maker, actuated by greed, or some feeling of revenge, interfered, and by threats and molestation stirred up strife and disputes which neither employer nor workmen theretofore thought of, he should be made irresponsible because of the very mischief he intended and hoped to stir up.

On this, the true construction, as I think, of the words "done in furtherance and contemplation of a trade dispute," occurring in the 3rd section of the Act of 1906, borrowed as they are from the Conspiracy and Protection of Property Act, 1875, it would appear to me that there is no inconsistency whatever between the finding of the jury on the first question left to them and their findings on questions 6 and 7. (1) The fact that the defendant, being what he was, interfered in order to compel the plaintiff to pay the old arrears he owed, and also in order to punish him for not paying them, does not, in my view, at all establish that his interference was an act done "in contemplation of a trade dispute" within the meaning of the statute.

The finding of the jury, therefore, on question No. 1 cannot, I think, be properly disturbed, and its alleged perversity was in effect, in my view, the only question raised by the notice of appeal.

It follows, therefore, that in my opinion the decision of the Court of Appeal should be reversed and the judgment and decisions of the Divisional Court and the county court restored, and this appeal allowed with such costs of this appeal as the appellant is entitled to.

(1.) The jury found (1.) that there was no trade dispute existing or contemplated by the men; (6.) that what the defendant did was done in order to compel the plaintiff to pay arrears of fine, and (7.) in order to punish the plaintiff for not paying the arrears.

LORD COLLINS. My Lords, I agree that this appeal should be allowed and the judgment of the county court judge and of the Divisional Court restored.

No doubt the learned counsel for the defendant submitted at the end of the plaintiff's case that there was no case for the jury, and the learned judge refused to stop the case. The learned counsel then called witnesses, including the defendant himself, and after the jury had answered a series of questions put by the learned judge, but framed by the parties as raising the proper issues, and the judge had entered judgment for the plaintiff, the defendant's counsel forthwith moved for a new trial on the ground that the verdict was against the weight of evidence, but he did not contend that on the findings as they stood he was entitled to judgment. The learned judge declined to order a new trial.

The defendant thereupon appealed to the Divisional Court. His notice of appeal properly did not raise any question except that argued in the Court below, namely, that the verdict was against the weight of evidence. The Divisional Court, addressing themselves to the same point only, affirmed the decision of the Court below. On appeal to the Court of Appeal the same point only seems to have been raised, and I can find no trace in the report of the judgments indicating that, admitting the findings to be unimpeachable, the defendant was nevertheless entitled to judgment; and the Court of Appeal accordingly arrived at their judgment only by ignoring the findings in favour of the plaintiff as perverse and unsupported by any reasonable evidence. Therefore, in my opinion, the case does not raise, and this House is not called upon to consider, the question whether, accepting the findings, the plaintiff is entitled to judgment. The case has been conducted throughout on the footing that he is. Furthermore, if the Divisional Court was right in refusing to disturb the verdict, this House is not called upon to put a construction on the recent Trade Disputes Act, since the jury have negatived any trade dispute, actual or contemplated.

I entirely agree with the reasoning of Channell J. in refusing to disturb this finding, which, in my opinion, it was quite reasonable for the jury honestly to arrive at on the evidence. It follows

H. L. (E.) 1909

CONWAY v. WADE.

that the decision of the Court of Appeal must be reversed and that of the Divisional Court restored.

LORD GORELL. My Lords, I concur in the judgment which has been delivered by the noble and learned Lord on the woolsack.

LORD SHAW OF DUNFERMLINE. My Lords, by the Trade Disputes Act, 1906, s. 3, it is provided that "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

In the present case an act was done by the respondent which induced the appellant's employers forthwith to dispense with his services.

The circumstances are set forth in the judgment of my noble and learned friend Lord James of Hereford, to which I shall afterwards refer. The jury have substantially affirmed that the act was of a threatening or coercive character and caused the loss of employment in circumstances which, at common law, would have afforded a good ground of action. But the respondent pleads that the act was done "in contemplation or furtherance of a trade dispute," and that his common law liability is thus removed. These terms have been construed by the learned judges of the Court of Appeal.

In view not only of the general importance of the question, but of the terms in which the judgments of the learned Lords Justices are couched, I need not say that I have considered with much anxiety the point raised. It is no doubt true that by s. 5, sub-s. 3, the expression "trade dispute" receives a very wide interpretation. It "means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment . . . . of any person," &c. But I cannot see my way to hold that "trade dispute" necessarily

includes accordingly every case of personal difference between any one workman and one or more of his fellows. It is true that after a certain stage even such a dispute, although originally grounded, it may be, upon personal animosity, may come to be a subject in which sides are taken, and may develop into a situation of a general aspect containing the characteristics of a trade dispute; but until it reaches that stage I cannot hold that a trade dispute necessarily exists.

My Lords, I cannot better illustrate my meaning than by simply taking the facts of the present case in the light of the rules of the trade union to which the appellant belonged. It is said that eight years ago he had been fined by his union and had not paid. In the interval he had rejoined the membership and was apparently a full paying member. Wade, the respondent, was an official delegate of the union. By the rules of the union, district committees were appointed to decide all complaints and disputes between members or branches in their district, and with regard to the official delegates it is provided that "under no circumstances shall they take part in a movement initiated by members or a strike which has not first been sanctioned by the executive council in accordance with these rules." This was not a strike. At the most it was a "movement initiated by the members." I do not think it was even the latter, but assume that it was, and it will be at once seen that the whole scheme of the union rules is to settle such movements so as to prevent them reaching the stage of a strike, and to hear not only disputes between members, but even complaints before they have reached the stage of dispute.

My Lords, the conduct of Wade was contrary not only to the terms but to the spirit of the rules, and I am not surprised to observe that the trade union accepts no responsibility whatever for such conduct. Suppose, however, these rules, instead of being violated, had been followed in the present case. When a complaint was made, if it ever was made, to Wade, as to the non-payment by Conway of a fine, two courses were open—either to suggest to Conway the payment which might have been made, and all dispute avoided, or, second, to act according to the rules, and submit the case to the district committee, and see that

H. L. (E.) 1909 CONWAY v. WADE. Lord Shaw of Dunfermline.

Conway was brought into line with the union. In that case also Conway might have been either excused or the fine adhered to. Up to that stage there were not, in my opinion, the general elements of a trade dispute which the statute requires.

In this view, what is meant by the words "in contemplation or furtherance of a trade dispute"? My Lords, I think the argument was well founded that the contemplation of such a dispute must be the contemplation of something impending or likely to occur, and that they do not cover the case of coercive interference in which the intervener may have in his own mind that if he does not get his own way he will thereupon take ways and means to bring a trade dispute into existence. To "contemplate a trade dispute" is to have before the mind some objective event or situation, with those elements of fact or probability to which I have adverted, but does not mean a contemplation, meditation, or resolve in regard to something as yet wholly within the mind and of a subjective character. I think that any other construction would be ill-founded and would lead to strange and mischievous results.

With regard to the term "furtherance" of a trade dispute, I think that must apply to a trade dispute in existence, and that the act done must be in the course of it and for the purpose of promoting the interests of either party or both parties to it.

My Lords, it will be seen that I accordingly respectfully but totally dissent from the view of the Master of the Rolls that "the words 'in contemplation' are difficult, but they must embrace an act done by a person with a view to bringing about a trade dispute," and from the opinion which Farwell L.J. expresses and the language he employs as to the object and intention of the Act. It will be seen from these judgments how far a wider construction of the terms "in contemplation or furtherance of a trade dispute" may be carried; but in my opinion to carry them beyond the region of a trade dispute, either actual, impending, or probable, and into the region of private animosity, which may, if thwarted, take the shape of bringing a trade dispute into being, is not a sound construction of the section.

Whether the trade dispute was actual, impending, or probable is a question of fact in each case.

Having reached that stage, I find myself in such entire agreement with the narrative and bearing of the circumstances, both in fact and in law, given by my noble and learned friend Lord James of Hereford, that I adopt and do not presume to add to his Lordship's opinion.

H. L. (E.) 1909 CONWAY v. WADE.

Order of the Court of Appeal reversed and order of the King's Bench Division restored with costs in this House to be taxed as usual where the appellant is a pauper: no costs in the Court of Appeal.

Lords' Journals, July 27, 1909.

Solicitors: *Gibson & Weldon, for Hannay, Hannay & Stuart, South Shields; Robinson & Bradley, for Edward Clark, Newcastle-upon-Tyne.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1909 *July* 29.

LOW OR JACKSON (PAUPER) . . . . . APPELLANT;

AND

GENERAL STEAM FISHING COMPANY, LIMITED . . . . . RESPONDENTS.

Employer and Workman—Compensation—Refusal of Sheriff to state a Case—Accident arising "out of and in the course of" the Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The appellant's husband was employed by the respondents to watch trawlers as they lay in Granton Harbour. He was on duty for twenty-five hours, during which time he had to provide his own food; and in connection with his duties it was occasionally necessary for him to be on the quay. In the course of his watch he left the trawlers and went to an hotel which was a short distance away from the harbour, where he got half a glass of whisky and a glass of beer. He was absent a very short time, and on his return to the quay, while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned:—

Held, reversing the decision of the Second Division of the Court of Session (Lord Loreburn L.C. and Lord Gorell dissenting), that the accident arose "out of and in the course of" the employment of the deceased within the meaning of the Workmen's Compensation Act, 1906,

H. L. (Sc.)
1909
LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

for when the accident occurred he had returned to the quay which was the scene or sphere of his duty.

By Lord Loreburn L.C.: That the deceased at the time of the accident was not using the ladder in the course of his employment, inasmuch as he was not upon the ladder in the course of his duty, but in the course of returning to it.

By Lord Gorell: That the deceased had no business to leave his duty of watching, and that the accident occurred during an excursion which he had made for his own purposes.

Reed v. *Great Western Ry. Co.*, [1909] A. C. 31, distinguished.

Query, must a party claiming compensation under the Workmen's Compensation Act, 1906, prove affirmatively not only that the accident causing the injury happened during the workman's employment, but also arose out of and in the course of his employment? And if the facts proved are equally consistent with the existence or non-existence of these essential conditions, must the applicant fail?

Practice—Appeal—Competency—Workmen's Compensation Act, 1906.

In a Scottish case the sheriff-substitute refused to state a case for the opinion of the Court of Session on the ground that the question proposed was not a question of law, but of fact. The Court being of opinion that the sheriff as arbitrator was bound to state a case, it was thereupon, on the suggestion of the Court and in order to minimize expenses, agreed by the parties that instead of the case being remitted to the sheriff it should be disposed of as "if upon a case stated by the sheriff in terms of the statute":—

Held, that the judgment of the Court of Session following on the said agreement was not pronounced extra cursum curiæ and was subject to appeal.

APPEAL from the Second Division of the Court of Session, Scotland. (1)

The appellant was Mrs. Mary Ann Low or Jackson, widow of the late Robert Slimon Jackson, watchman, Edinburgh. The respondents were the General Steam Fishing Company, Limited.

The appeal arose out of an application under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1, in the Sheriff Court, Edinburgh, at the instance of the appellant, who claimed 150*l.* compensation for the death of her said husband through an accident "arising out of and in the course of" his employment with the respondents. On July 8, 1908, the sheriff-substitute (John C. Guy) found, inter alia, the following facts,

(1) (1909) S. C. 63.

which were put into the form of a "note of appeal" by the defenders and revised by the sheriff-substitute on July 22, 1908.

"(3.) That the said Robert Slimon Jackson was in the employment of the appellants" (now the respondents), "his employment being to watch the trawlers while they lay at Granton Harbour between their voyages; (4.) that about 4 P.M. on Saturday, February 22, 1908, he went on duty as watchman of four trawlers belonging to the appellants" (now the respondents), "moored to Granton Quay, his duty in connection with these being expected to terminate about 5 P.M. on the following day; (5.) that in connection with the said duty it was necessary for him to be at times on the quay at Granton; (6.) that during the twenty-five hours of his continuous duty he had to provide his own food, which was sometimes brought to him by members of his family; (7.) that on the night of said Saturday, February 22, between 9 and 10 P.M. he left the trawlers and went to Wardie Hotel, which is a short distance from the harbour, to obtain some refreshment; (8.) that the refreshment partaken of by him at the hotel consisted of half a glass of whisky and a glass of beer; (9.) that he was absent from the boats for a very short time, and on returning to the quay, along with two friends, he proceeded to descend the fixed ladder attached to the quay for the purpose of getting on board one of the trawlers, and while doing so he slipped and fell into the water and was drowned; (10.) that the said accident arose out of and in the course of his employment with the defenders" (respondents); "(11.) that the average weekly earnings of the deceased was 6*s.*; (12.) that the appellant was wholly dependent upon her husband's earnings, and was the only person so dependent."

The respondents asked the sheriff-substitute to state a case to the Court of Session on the following question of law: "Whether the deceased was drowned through an accident arising out of or in the course of his employment." The sheriff-substitute refused. He also found that the amount due to the appellant as compensation was 150*l.*

The sheriff-substitute on July 22, 1908, granted the following certificate: "The sheriff-substitute refuses to state a case for the opinion of the Court of Session, as in his view the question

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

proposed is not a question of law but of fact, and that the arbitration disclosed no controversy between the parties except on questions of fact" ; and he revised the findings in fact, adding a new clause, No. 8, making the old No. 9 No. 10 as given above. The respondents thereupon appealed to the Second Division of the Court of Session asking that the sheriff might be ordered to state a case on the grounds that (1.) "the deceased was a watchman who, on the above findings, left his employment to obtain whisky and beer, and was drowned while attempting to return to his duties as watchman, and the appellants (respondents here) accordingly maintain that no compensation is due ; (2.) because the question whether the deceased was or was not killed through an accident arising out of or in the course of his employment under the conditions found proved as above is a question of law and not of fact."

On the case coming before the Second Division of the Court of Session, the Court intimated that in their view the arbitrator was bound to have stated a case, and that finding No. 10 of his findings was a finding in law and should have been so stated. Thereupon, on the suggestion of the Court and in order to minimize expense, counsel for the parties, in view of the intimation of the Court as to their view of the duty of the arbitrator, concurred in the following joint minute. The minute, after referring to the decision of the Court that the respondents were entitled to require the sheriff-substitute to state a case, continued: "and further, in view of the fact that the said sheriff-substitute had appended a note to his certificate of refusal to state a case that 'I have revised the findings in fact to bring them into conformity with the proof in the proceedings,'" counsel on each side "concurred in stating to the Court that they agreed that instead of the case being remitted to the sheriff-substitute it should be disposed of as if upon a case stated by the sheriff-substitute in terms of the statute, the statements in fact in said note, with the exception of No. 10 thereof, being held as findings in fact in the case stated. They further agreed that the finding No. 10 should be taken as reading 'Having found in fact in terms of the foregoing findings, I further found that the accident arose out of and in the course of the employment of the deceased with the defenders' (respondents).

They further agreed that the question of law for the consideration of the Court should be as if stated as follows: 'On the facts so admitted or proved was the sheriff-substitute right in holding that the deceased man was killed by an accident arising out of and in the course of his employment with the appellants' (respondents) 'in the sense of the Workmen's Compensation Act, 1906, s. 1, sub-s. 1?'"

On November 7, 1908, the Second Division pronounced the following interlocutor: "Find that the arbitrator was bound to have stated a case and that finding 10 of his findings is a finding in law and not in fact and should have been so stated. Further, having considered the joint minute, and the note of appeal as amended as a stated case on appeal, Find that the deceased Robert Slimon Jackson was not in the course of his employment when he met his death. Therefore remit to the arbitrator to recall his award and dismiss the claim and decern; Find the appellants, (respondents), entitled to their expenses since July 22 last."

The appellant, Mrs. Jackson, appealed, and the Appeal Committee allowed her to prosecute her appeal in forma pauperis.

The questions for determination were, first, whether the judgment appealed from was pronounced extra cursum curiæ and was therefore not subject to appeal; and in the second place whether, upon the facts as set forth in the amended findings in fact and the question of law, the appellant's husband was killed by an accident arising out of and in the course of his employment with the respondents in the sense of the Workmen's Compensation Act, 1906.

QUESTION OF COMPETENCY.

1909. July 8. *C. A. Russell, K.C.* (with him *J. G. Jameson*) (the latter of the Scottish Bar), for the respondents. The appeal is incompetent. Where jurisdiction is given by consent there is no appeal. The parties by their minute were not merely trying to save expense, but to put an end to the case once for all.

[LORD LOREBURN L.C. Was it more than abbreviating the procedure? It is "as if upon a case stated by the sheriff-substitute in terms of the statute."]

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

The only way in which they could completely review the award of a sheriff-substitute acting as arbitrator under the Act was when it was submitted upon a stated case. In the present case there was no stated case by the sheriff-substitute. The parties by the joint minute conferred an extraordinary and conventional jurisdiction upon the Second Division to decide the case, and the decision which followed was final. In referring the case to the decision of the Second Division the parties constituted that Court a final tribunal between them in like manner as though the Court had been a Court of arbitration. No appeal lies to this House from an arbitrator's award except by way of a stated case: Workmen's Compensation Act, 1906, Sched. II., s. 17, sub-s. (*b*), and s. 17 of the Act of Sederunt of June 26, 1907, which contains a code of procedure applicable to appeals under the statute. The minute shews the Court were dealing with the case by consent.

[LORD LOREBURN L.C. If the Court were dealing with the case as if there were a case stated, was there not a right of appeal?

LORD SHAW OF DUNFERMLINE. Your client having been a party to the minute, is it right to take this course?]

This is a matter of procedure, and it can be shewn by authorities in this House that the appeal is incompetent. (1)

The House was unanimously of opinion that the appeal was not incompetent on the ground that what was done was merely done to abbreviate the procedure and save expense.

On the main question,

J. Roberton Christie (with him *J. C. Fenton*) (both of the Scottish Bar), for the appellant. The finding No. 10 was purely a finding in fact, and the only question of law is whether on the facts as admitted or proved the sheriff-substitute was justified in holding that the deceased man was killed by an

(1) The cases alluded to were *Craig* v. *Duffus*, (1849) 6 Bell's App. 308; *Dudgeon and Martin* v. *Thomson and Patrick*, (1854) 1 Macq. 714; *Magistrates of Renfrew* v. *Hoby*, (1856) 2 Macq. 478; *White* v. *Duke of Buccleuch*, (1866) L. R. 1 Sc. & D. 70; and *Burgess* v. *Morton*, [1896] A. C. 136.

accident arising "out of and in the course of" his employment. This finding of fact was correct and conclusive and one at which a reasonable man would have arrived: *Henderson* v. *Corporation of Glasgow* (1); *Bist* v. *London and South Western Ry. Co.* (2); *Vaughan* v. *Nicoll* (3); *George* v. *Glasgow Coal Co.* (4); *Pomfret* v. *Lancashire and Yorkshire Ry. Co.* (5) It is impossible to read the finding as adjusted by the sheriff-substitute without being convinced that he was satisfied that the deceased at the moment when he proceeded to descend the fixed ladder was going from one place (the quay) where his duty required him to be (finding No. 5) to another (a trawler), and was not merely in course of returning to the place of his duties from some place beyond their sphere. If this be so, it cannot be said that there was no evidence to warrant the finding that the accident to the deceased arose out of and in the course of his employment, or that in so finding the sheriff-substitute, treating himself as jury, had misdirected himself.

[LORD LOREBURN L.C. referred to *Reed* v. *Great Western Ry. Co.* (6)]

There the opinion of Lord Macnaghten was that the evidence shewed that at the time when the accident happened the man was "about his own business, not about the business of his employers"; here the man was doing what the sheriff-substitute held was necessary, namely, finding his own food and drink. The sheriff-substitute was satisfied that at the moment of his death the deceased was doing the very thing he was employed to do; he had not been away for any time, and he had returned to the scene of his employment.

C. A. Russell, K.C., and *J. G. Jameson*, for the respondents. The findings here fall short of what is essential to bring the case within the compensation clause in the statute. The accident did not arise out of and in the course of the deceased's employment. The case belongs to the class of cases in which a workman is killed during his working hours, but while he is engaged in what is tantamount to a deviation from the course

(1) (1900) 2 F. 1127, 1135.
(2) [1907] A. C. 209.
(3) (1906) 8 F. 464.
(4) [1909] A. C. 123.
(5) [1903] 2 K. B. 718, 723.
(6) [1909] A. C. 31, 34.

H. L. (Sc.) 1909 LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

of his employment: *Smith* v. *Lancashire and Yorkshire Ry. Co.* (1), adopted in *Reed* v. *Great Western Ry. Co.* (2) In the latter case the deceased had only gone a few steps from his work. Here the man was on a trawler and left it to get refreshments, an act which was plainly not within the course of his employment. There is no finding that this was one of the occasions when it was necessary for him to be on the quay.

[LORD LOREBURN L.C. I fail to see that it was necessarily outside his duty to get some food during twenty-five hours.]

While the deceased was in the hotel there was no watchman watching the trawlers, and it was for the claimant to prove that the deceased might at times leave his watch to get some refreshments. He had no right to quit the locus of his employment, even to get refreshments, for he was bound to supply his own food. It must be shewn he was at the moment of the accident "in the course of his employment." Here he was not on the quay "in the course of his employment." The act of going to the public-house might be natural, might be wholly innocent, but it was outside the course of his employment: *Lowe* v. *Pearson.* (3) This was not the case of a man compelled to go away in search of food; he was in the position of a sentry and ought to have remained where he was. There was water on board the trawlers, and he had to take his own food on board. And it was quite incompatible with the course of his employment that he should eat his food anywhere else than on board one of the trawlers, for they were boats in which people are obliged to live. The question is narrowed down to this: Was he on his own business when he was on the quay at the moment of the accident? There was no finding that he at that moment was acting in the course of his employment.

[LORD LOREBURN L.C. If there had been a finding of fact on the point that what the man did was reasonable the case would have been much easier.]

The applicant for compensation must prove, beyond doubt, that the deceased was killed in the course of his employment:

(1) [1899] 1 Q. B. 141. (2) [1909] A. C. 31.
(3) [1899] 1 Q. B. 261.

McDonald v. *Owners of Steamship Banana* (1), followed in *Moore* v. *Manchester Liners, Ld.* (2)

J. Roberton Christie, in reply, cited *Robertson* v. *Allan Brothers & Co.* (3) and *Mullen* v. *Stewart & Co.* (4)

The House took time for consideration.

July 29. LORD LOREBURN L.C. My Lords, the only question in this case is whether or not there was evidence upon which a reasonable man could find that the accident which caused the death of the deceased arose out of and in the course of his employment. If there was such evidence, this appeal must be allowed, for the sheriff-substitute answered the question in the affirmative. No doubt this is often a difficult point to determine, and it does not imply any reflection upon the judgment of a Court of first instance that an appellate Court, on a more mature examination, is unable to agree.

I assume, as incontrovertible, the findings in fact of the learned sheriff-substitute, but I cannot see that they contain anything which, upon a fair construction, warrants the conclusion at which he arrived. The place at which this accident occurred, namely, the fixed ladder which the deceased man descended in order to get on board one of the trawlers, was within the ambit of his duty in the sense that he had sometimes to be on the quay, and therefore might sometimes be obliged to use this ladder to get there from the trawler or thence to the trawler. This comes to no more than that he might be on the ladder in the course of his employment.

Still the question must be answered in this case, was he on the ladder in the course of his employment, and did the accident arise out of that employment? It seems to me not to have been so. The only view I can take of the evidence is that this unfortunate man quitted his employment in order to go to the hotel and obtain refreshment, and that he was on the ladder on his return from that excursion. If he had remained at his duty he might imaginably have used the ladder to get on the quay and

(1) [1908] 2 K. B. 926.
(2) [1909] 1 K. B. 417.
(3) (1908) 98 L. T. 821.
(4) (1908) S. C. 991, 994.

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

Lord Loreburn L.C.

to return in the course of that duty. In fact, when he used it to return to the trawler he was not there in the course of duty, but in the course of returning to it.

I do not think the provisions of a remedial Act, such as this Act is, ought to be construed in any narrow spirit. When a man is employed, especially for so long a time, he is not usually expected to be at work unceasingly, without either rest or pause. Everything, of course, must depend upon the nature of what he has to do, but allowance should be made for the ordinary habits of human nature and the ordinary way in which those employed in such an occupation may be expected to act. A man may be within the course of his employment not merely while he is actually doing the work set before him, but also while he is where he would not be but for his employment, and is doing what a man so employed might do without impropriety. It is always a question to be solved by good sense on the facts of the particular case, and not much help can be given by attempts to formulate in more precise language the meaning of the words used by Parliament. In the present case every one must be sorry for those who have suffered by this deplorable accident, but I cannot find evidence justifying the conclusion of the learned sheriff-substitute.

LORD ASHBOURNE. My Lords, the question in this case arises on a simple state of facts, as to which, however, different minds may arrive not unreasonably at different conclusions.

Did the accident which caused the death of the deceased arise out of and in the course of his employment? Was there evidence on which such a conclusion might reasonably be founded?

The deceased was employed to watch trawlers in Granton Harbour between the voyages, and sometimes it was necessary for him to be on the trawlers and sometimes on the quay. He had to provide his own food, which was sometimes brought to him by members of his family, but it is not found that he was prohibited from leaving the ambit of his duty for a short and reasonable time to get refreshment.

On the evening of February 22 he left the trawlers and went to an hotel which is a short distance from the quay to get some

refreshment, and was absent for a very short time. On returning to the quay he proceeded to descend the fixed ladder attached to the quay for the purpose of getting on board one of the trawlers, and while doing so he slipped and fell into the water and was drowned. Hence the question, Did the accident arise out of and in the course of his employment, or rather is there evidence to support such a finding?

The sheriff-substitute found on the facts for the claimant; but the Lord Justice Clerk and the judges of the Second Division decided that the accident happened while the deceased was absent from the scene of his duty, and that when he was going back he was not in the course of his employment, because he had no right to be away.

If the deceased had met with a fatal accident at the hotel or before he had returned to the scene or sphere of his duty, I would be disposed to concur, but the workman had returned to the quay, where he had a right to be, and was about entering a trawler, where he had a right to go. He was within the scope and scene of his duty on both quay and trawlers; he had a right to leave the trawler for the quay, and the quay for the trawler. He was not at the time of the accident going back to or returning to his employment; he had already, I think, come back when he had reached the quay and was ready to resume his watch: *Moore* v. *Manchester Liners, Ld.* (1) He had a long guard or watch of twenty-five hours, and if it was intended that he should have no right to go "a short distance for a very short time" for refreshment it would have been more satisfactory if there had been some finding on the subject.

On the facts as admittedly before us I arrive at the conclusion that there was evidence that the accident arose out of and in the course of his employment, and I move your Lordships that the appeal be allowed with costs.

LORD JAMES OF HEREFORD. My Lords, in my opinion this appeal should succeed.

The sheriff-substitute has found that the deceased man Robert S. Jackson met with an accident causing his death

(1) [1909] 1 K. B. 417.

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

Lord James of Hereford.

arising out of and in the course of his employment by the defendants.

This finding may, dependent on circumstances, be regarded as one of law or of fact. If there was no evidence to support the finding a question of law arises. If there was conflicting evidence bearing upon the issue raised the question must be regarded as one of fact.

My opinion is that there was evidence to support the finding of the sheriff-substitute, and I further think that such finding was correct.

There was no contract on the part of the deceased man to remain on board the trawlers. His contract could have been performed if he were on the quay. But he left both vessels and quay for the purpose of obtaining refreshment. It must have been contemplated that during the long hours of his continuous service (twenty-five hours) the deceased would need and obtain refreshments. As a rule there was no need for him to leave the quay to obtain them, but on the night of the accident the usual supply failed, and the deceased obtained refreshment at a neighbouring hotel. No argument appears to have been raised on the nature of the refreshments obtained.

After leaving the hotel the deceased man returned to the quay, a place where, as I have said, he might rightly be when discharging his duties. Passing from such place in order to reach one of the trawlers he fell off a ladder and was drowned. It seems that this case differs clearly from that of *Reed* v. *Great Western Ry. Co.* (1) In that case the deceased, in breach of his duty, left his engine and crossed the railway line in order to purchase a magazine. Such act in no way arose out of his employment, nor was it in the course thereof.

In this case the obtaining of refreshment was necessary to the performance of the deceased's duties. His passing from the quay to the trawler in my opinion arose out of and was in the course of his employment. The fact that the deceased had been to the hotel does not alter the position.

The appeal ought therefore to prevail and be allowed with costs.

(1) [1909] A. C. 31.

LORD ATKINSON. My Lords, this is an appeal from the judgment of the Second Division of the Court of Session in Scotland pronounced upon an application made on behalf of Mrs. Mary Ann Low or Jackson, widow of Robert Slimon Jackson, deceased, formerly a watchman in the respondents' employment, to require the arbitrator, the sheriff-substitute of the Lothians and Peebles, to state a case for the opinion of the said Division in reference to his decision upon a claim made by her under the Workmen's Compensation Act, 1906, for compensation in respect of the loss sustained by her by reason of her husband's death by drowning while in that employment. The arbitrator, who had found that the accident by which the deceased lost his life arose out of and in the course of his employment with the respondents and awarded the widow 150*l.* as compensation, had refused to state a case, on the ground that the above-mentioned finding was a finding on an issue of fact, not an issue of law.

The respondents presented a note to the above-mentioned Division of the Court of Session, setting out certain statements of fact, which they alleged were admitted or proved. The arbitrator apparently revised these statements of fact to bring them into conformity with the evidence. On the application coming on the Court of Session decided that the sheriff-substitute was bound to state a case, and it was thereupon agreed between the parties that, instead of the case being remitted to him to have a case formally stated, it should be disposed of "as if upon a case stated" by him in the terms of the statute. The statements of fact in the above-mentioned note, with the exception of No. 10 thereof, were treated as findings of fact in the case stated, and finding No. 10 was taken as reading thus: "Having found, in fact, in terms of the foregoing findings, I further found that the accident arose out of, and in the course of, the employment of the deceased with the defenders," and that the question of law for the consideration of the Court should be as if stated as follows: "On the facts so admitted or proved, was the sheriff-substitute right in holding that the deceased man was killed by an accident arising out of and in the course of his employment in the sense of the Workmen's Compensation Act, 1906, s. 1, sub-s. 1?"

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

Lord Atkinson.

The statements of fact other than No. 10 material for consideration in deciding this question of law were as follows: [His Lordship read findings 3, 4, 5, 6, 7, 8, 9, and 10 as given above, and continued:—]

The Second Division of the Court of Session decided that the deceased was not in the course of his employment when he met his death, and remitted it to the arbitrator (the sheriff-substitute) to recall his award and dismiss the applicant's claim. Your Lordships having decided that owing to the above-mentioned consent the parties are to be taken to be in the same position as if a case had been regularly stated, it only remains to consider the decision of the Second Division on the above-mentioned question of law.

That question of law, however, must, according to many decisions of your Lordships' House, as well as of other tribunals, necessarily resolve itself into this: Was there evidence given before the sheriff-substitute upon which he might reasonably have found that the accident by which the deceased met his death "arose out of and in the course of his employment"? It is not quite clear from the form of the interlocutor of the Second Division, set out at page 12 of the appellant's case (1), whether that Court meant to decide this question of law in the negative, or meant to decide as a question of fact on the findings that the deceased was not in the course of his employment when he met his death. As the Court would have no jurisdiction to decide a question of fact, they must, I think, be assumed to have decided the question they had jurisdiction to decide and none other.

In cases under the Workmen's Compensation Act of 1906 the onus of proving the conditions which must be fulfilled in order to obtain an award rests upon the applicant. He or she must, in a case such as this, establish that the accident causing the injury not only happened during the workman's employment, but also arose out of and in the course of his employment. If the facts proved are equally consistent with the existence or non-existence of the essential conditions, then the applicant must, on the principle of *Wakelin* v. *London and South Western Ry. Co.* (2), fail.

(1) Ante, p. 527.

(2) (1886) 12 App. Cas. 41.

One of the difficulties arising in this case is due to the ambiguity of the findings of the arbitrator as to the terms on which the deceased was employed. One would have supposed that it would have been easy for him to have ascertained, and expressly found, whether the deceased was employed upon the terms that he should not absent himself from the boats and quay to procure refreshment, or for any other purpose, during his long watch of twenty-five hours, or on the terms that he might absent himself to procure refreshment when the necessities of human nature reasonably required that he should do so.

The very nature of his duties may in itself imply that he was bound never to leave his post. On the other hand, since it would be quite unreasonable to expect that he could subsist for such a time without procuring nourishment, it might be implied from the very length of his vigil that it was a term of his contract that he might absent himself when necessary to obtain refreshment. What the sheriff has found is (6.) "that during the twenty-five hours of his continuous duty he had to provide his own food, which was sometimes brought to him by members of his own family." But to my mind that leaves it quite uncertain whether or not it was a term expressed or implied of his contract of service that all food or refreshment which he might require should be brought by him, or to him, to the place or places from which he was to watch.

On the facts and findings as they appear, it is, I think, impossible to say whether or not there was substantive evidence before the arbitrator to the effect that the deceased was not, according to the terms of his employment, entitled to absent himself to procure refreshment, and, accordingly, if he had met with the accident before he returned to the quay, I should have been inclined to hold that the claimant had failed to discharge the particular burden of proof which, as I have indicated, rested upon her. But the fact that the accident happened after he had returned to the quay alters, in my view, the whole position.

If his duty had been to keep watch on board some particular one of those four trawlers, and if he had returned to his ship before the accident befell him, then I think, on the authority of

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

Lord Atkinson.

McDonald v. *Owners of Steamship Banana* (1) and *Moore* v. *Manchester Liners, Ld.* (2), it would have been rightly held that the accident arose "out of and in the course of his employment," even although he had gone in search of refreshment in violation of his duty, while if the accident had occurred, as it did in fact occur in this case, before he had reached the particular trawler, it would, on the contrary, have been rightly held that the accident did not arise "out of and in the course of his employment"; the crucial question, according to these authorities, apparently being whether the employee had, before the accident befell him, reached the place where he was to discharge the duties of his employment.

In the present case the deceased could not discharge his duty by remaining in any one of the four boats. He was to watch over all of them and over the mooring of each. In weather such as that which on this night prevailed, he was entitled to visit, indeed, if not bound to visit, each of them, and entitled to go on board any of them and remain there for some time. His field of operations, so to speak, embraced this quay, the trawlers, and the means of approach to each of them. At the time the accident happened he had a right to be at the place in which he actually was. Had he, on his return from the public-house, examined for a moment the mooring of the boats, and then proceeded to go on board one of them, as he in fact attempted to do, it could scarcely be contended that, despite the alleged impropriety of his visit to the public-house, the accident had not arisen "out of and in the course of his employment," since he would then, immediately upon his return, have entered upon the active discharge of one of the duties he was hired to discharge, and from that moment would have been in the same position as if he had never left at all. Or again, if during the night he had, after seeing the boats were all secure, gone ashore to walk up and down the quay, not in order to watch his boats, but to keep himself warm, and had, on attempting to return to the trawler from which he had gone on shore, met with an accident such as he in fact met with, it

(1) [1908] 2 K. B. 926. Note.—Appeal Committee refused leave to sue in forma pauperis, July 29, 1909. *Lords' Journals*, July 30, 1909.

(2) [1909] 1 K. B. 417.

could not, I think, be contended that this accident had not arisen "out of and in the course of his employment," on the ground that he was employed to watch and not to warm himself.

The duty of the deceased was to be at this quay and to take care of these boats. In the discharge of that duty he was entitled to pass from quay to trawler, and from trawler to quay, when and as often as he pleased during the twenty-five hours on which he was on the watch. Once he returned to the quay, the so-called "deviation" was, I think, at an end, and the deceased was thenceforward quoad the quay, the boats, and the approaches to them in the same relative position as the steward was to his ship in *Robertson* v. *Allan Brothers & Co.* (1) In that case the steward went ashore on his own business, returned to his ship by a skid,—a prohibited means of approach,—and, on stepping from this skid to the deck of the ship, he stumbled and fell into a hold.

The Master of the Rolls, in his judgment in *Moore* v. *Manchester Liners, Ld.* (2), deals with that case thus. He says: "Nor do I see any inconsistency between that case (*McDonald* v. *Owners of Steamship Banana* (3)) and the case of *Robertson* v. *Allan Brothers & Co.* (1) If a sailor has been out for his own amusement, whether with or without consent, his right to protection under the Act is complete when once he has got back on board the vessel. In *Robertson* v. *Allan Brothers & Co.* (1) the man fell through an open hatchway into the hold after he had got on board the vessel."

If, on the contrary, it should be held that the "deviation" had not terminated when the deceased arrived at the quay, it is difficult to see when, or at what particular place, it could be held to terminate. If it should be held to continue till he had reached the particular boat or place in the boat from which he originally departed to carry out his unauthorized enterprise, then if he went to another trawler, or remained on the pier, no matter how employed, it would still continue, while if the resumption of the active discharge of his duties be the point of termination, then it is difficult to see how the deceased could be

(1) 98 L. T. 821. (2) [1909] 1 K. B. 417, at p. 420.
(3) [1908] 2 K. B. 926.

H. L. (Sc.) 1909 — LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED. — Lord Atkinson.

considered to have resumed his duties more effectually by returning to the trawler he had left, and going to sleep there, than by remaining awake upon the quay. In such a case as this, where the workman had, before the accident occurred, returned to a place in which he was to discharge his duties, and in which, for all that appears in the findings, he may in fact have entered upon the active discharge of them, the question is whether, in the absence of all evidence as to whether he had entered upon the discharge of them or not, the presumption should be that the alleged deviation terminated on his arrival at that place, even though he had not reached the particular spot in the field over which his employment extended from which it commenced, or that the deviation continued, and he was still engaged in carrying out his unauthorized enterprise until he reached that spot.

In my view it is in this case a choice between these two presumptions. I think the former is the fairer and more reasonable, although, of course, the fact that so many of my noble and learned friends differ from me deprives me of much confidence as to the soundness of the conclusion at which I have arrived.

For these reasons I am of opinion that there was evidence on which the sheriff-substitute might reasonably have found, as he did find, that the accident arose out of and in the course of the deceased's employment, and therefore I think that the judgment of the Court of Session was erroneous and should be reversed, and this appeal be allowed with costs.

LORD GORELL. My Lords, the question in this case is whether there was evidence before the sheriff-substitute upon which he was entitled to find that the accident which caused the death of the appellant's husband, Robert Slimon Jackson, arose out of and in the course of his employment with the respondents. The sheriff-substitute found the facts to be as stated in the note set out at page 10 of the appellant's case, but refused to state a case. On an application to the Second Division of the Court of Session to compel him to do so, it was agreed that, instead of the case being remitted, it should be disposed of as if upon a case stated in terms of the statute, the statements of fact in the said

note, with the exception of No. 10, being held as findings of fact in the case stated, and that finding No. 10 should be taken as reading, "Having found, in fact, in terms of the foregoing findings, I further find that the accident arose out of, and in the course of, the employment of the deceased with the defenders." The sheriff-substitute awarded 150*l.* compensation to the widow, the appellant. The Second Division held that the deceased was not in the course of his employment when he met his death, and set aside the award.

The findings shew that the deceased was employed by the defenders to watch certain trawlers while they lay at Granton Harbour between their voyages, and that in connection with his said duty it was necessary for him to be at times on the quay at Granton.

It seems that the trawlers were moored at Granton Harbour from Saturday afternoon to Sunday afternoon (February 22 and 23, 1908), that the deceased went on duty at 4 P.M. on the Saturday and his duty would terminate at 5 P.M. on the Sunday, and that during the twenty-five hours of his continuous duty he had to provide his own food, which was sometimes brought to him by members of his family. Considering that his duty was to watch continuously, no doubt to keep the boats free from fire, burglary, and accident of any kind, and to watch the moorings as mentioned in the findings, it is clear that he could not discharge that duty properly if he were to leave the trawlers during any part of the twenty-five hours. The finding as to food cannot, having regard to the nature of the duty, mean that he might absent himself to procure food. I think it must mean that he either had to bring his food with him or members of his family brought it to him. He would naturally have the use of the accommodation on the trawlers, or one of them. There is no finding that it was an ordinary incident of his duty to leave the trawlers to obtain food, and if this were the case it should have been proved by the claimant. It may at first sight seem hard that the deceased should be expected to be continuously on duty for twenty-five hours, but it must be remembered that this duty was only between the voyages of the trawlers, which are moored from Saturday afternoons to Sunday afternoons.

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

Lord Gorell.

In my opinion the findings establish that the deceased had no business to leave his duty of watching.

It is, however, found that on the night of the Saturday, between 9 and 10 P.M., he left the trawlers and went to Wardie Hotel, which is a short distance from the harbour, to obtain some refreshment, and there had half a glass of whisky and a glass of beer; that he was absent from the boats for a very short time, and on returning to the quay, along with two friends, proceeded to descend the fixed ladder for the purpose of getting on board one of the trawlers, and, while doing so, he slipped and fell into the water and was drowned.

My Lords, it is incumbent upon the claimant to prove that the accident arose out of and in the course of the deceased's employment. If he had met with an accident while away from the trawlers and quay, I should think that there can be no doubt such accident would have been while he was about his own pleasure and not about the business of his employers, and the only difficulty which I feel about the case is whether it can be said that, because he had returned to a point where he might at times be said to have some duty to perform, he could be considered as engaged on his duty, though not actually doing work, but upon reflection I have come to the conclusion that this fact does not establish that the accident arose out of and in the course of his employment.

In the first place I notice that the finding (5.) is, that in connection with said duty it was necessary for him to be at times on the quay at Granton, but there is nothing whatever to shew that at the time in question it was necessary for him to be on the quay in connection with his duty, and it seems to me clear that he was exposing himself to danger for his own purposes, and not in any way in connection with his duties, and that the accident did not arise out of his employment. Secondly, the case differs entirely from such a case as *Robertson* v. *Allan Brothers & Co.* (1), where a steward employed aboard a ship went ashore while the ship was discharging cargo in port during hours when he was at liberty to do so, and returned on board,

(1) 98 L. T. 821.

to some extent under the influence of drink, by a cargo skid instead of by the ordinary gangway, and fell down an unguarded hatchway into the hold. There the man was returning to the ship in pursuance of his obligation to return to duty at some time after being on leave ashore which would enable him to begin his work at the proper time; the return after leave was a normal and natural incident arising out of the employment.

In the present case, assuming that the deceased had no business at all to go to the hotel, except his own pleasure, as I think was the case, his return was not a normal and natural incident arising out of his employment; and, further, the mere fact that he had reached the locality where his duties lay does not necessarily determine that an accident to him in that locality arises out of and in the course of his employment: see *Smith* v. *Lancashire and Yorkshire Ry. Co.* (1)

The case of *McDonald* v. *Owners of Steamship Banana* (2) does not assist in the decision of the present case, for all it decided was that the claimant had in the circumstances failed to prove that the accident arose out of, or in the course of, her husband's employment. In the case of *Moore* v. *Manchester Liners, Ld.* (3) the accident happened to a fireman before he actually got back to his vessel, and although the circumstances were such as to enable the majority of the Court to decide against the claimant because the deceased had not actually returned on board his vessel, I cannot regard this as deciding that in every case it necessarily follows that because a man is at the place where he has duties every accident to him there arises out of and in the course of his employment. That would not be consistent with the decision in *Smith* v. *Lancashire and Yorkshire Ry. Co.* (1) No doubt, generally speaking, it may be easy to prove or infer that, if a man meets with an accident at the place where his duties lie, the accident arose out of and in the course of his employment; but still it is a question of evidence, and if the evidence demonstrates that at the time and place he was engaged for his own pleasure upon something

(1) [1899] 1 Q. B. 141. (2) [1908] 2 K. B. 926.
(3) [1909] 1 K. B. 417.

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

Lord Gorell.

altogether outside his employment, I fail to see how it can with reason be said that the accident arose either out of or in the course of the employment. In order that the claimant may recover the accident must arise out of as well as in the course of the employment.

It may be difficult in some cases, where a man has been away without leave and has returned to his place of work, to say that he has not resumed his employment; but in the present case the findings shew that the deceased was not doing, or intending to perform, any duty on the quay, and was returning to one of the trawlers, having not yet finished the excursion which he had made for his own purposes. If the accident had occurred while he was on the same ladder, going away from the trawlers for his own purposes, I should have thought it would be reasonably clear that no claim could be maintained, and I can see no material difference between such a case and the present one.

In my opinion there was no evidence which would entitle the sheriff-substitute to find that the accident arose out of and in the course of the deceased's employment with the defenders, and I agree with the decision of the Second Division and think that this appeal should be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, the learned sheriff-substitute sat in this case as arbitrator under the Workmen's Compensation Act and made the twelve findings of fact which appear in the proceedings. The tenth finding was that "said accident arose out of, and in the course of, his employment with the defenders." So clear was the sheriff-substitute that this was a finding in fact, that he declined to state a case for the opinion of the Court of Session, because no question of law was raised upon which an appeal could be made. While it might, no doubt, have saved expense if the sheriff-substitute had simply stated a case for appeal, the course which he took seems to have been justified by the authority of *Henderson* v. *Corporation of Glasgow* (1), in which the Court, including the late Lord President

(1) 2 F. 1127.

Kinross, distinctly approves of a declinature on the ground that the question put is "whether the accident was one arising out of, and in the course of, Henderson's employment, and the sheriff declined to state it because he considered that it was one of fact and not of law." In my opinion the present case was not distinguishable from Henderson's in principle. I cannot agree with the learned judges of the Second Division that it is so distinguishable.

The case, however, after an intimation of opinion in a contrary sense by the Second Division, was, by a very proper arrangement between the parties, taken as having been stated with a substituted finding for that above quoted. The new finding reads, "Having found, in fact, in terms of the foregoing findings, I further found that the accident arose out of, and in the course of, the employment of the deceased with the defenders," and it was agreed that the question of law should be stated for the Court thus: "On the facts so admitted or proved was the sheriff-substitute right in holding that the deceased man was killed by an accident arising out of, and in the course of, his employment with the appellants" (now the respondents) "in the sense of the Workmen's Compensation Act, 1906, s. 1, sub-s. 1?"

My Lords, there is some difficulty even with this amendment in doing what apparently we are required to do, namely, considering whether there is any question of law raised in this case. I can perfectly understand that the point whether the accident arose out of and in the course of a person's employment may be either (1.) a question of fact, (2.) in the more general case an inference in fact, or (3.) in the case, much rarer in ordinary practice, an inference either of law or of mixed law and fact. It is in the last-mentioned case alone that an appeal on stated case would be competent.

I desire to adopt in terms the language of Lord Kinnear in *Henderson's Case* (1): "As to the last point, whether the accident arose out of, and in the course of, his employment, I think the sheriff is quite right in saying that it is only a question of fact,

(1) 2 F. 1127, 1138.

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

Lord Shaw of Dunfermline.

if he has treated it as a question of fact. It has occurred in several cases which have come before us, that questions of law have been stated in terms of fact, and in those cases, if we had looked at nothing but the exact words of the question of law, we might have been obliged to say 'there is nothing for us to consider.' But then it sometimes appears that the sheriff or arbiter has come to his conclusion of fact upon a ground of law, because he has considered himself constrained by a construction of the statute, or by some rule which he supposed to be a rule of law, to adopt a certain construction of the facts, and in a case of that kind it is quite right and necessary that this Court should entertain an appeal. It has been sometimes said that the question in that kind of case is raised in very much the same way as if we were asked to consider a hypothetical charge given by the sheriff as judge to himself as a jury, and to find that he had given himself a wrong direction. But then that kind of question never can arise when the sheriff says in so many words—'I think this is a question of fact, and I decide it upon the facts; I have not proceeded upon law at all'; and that is what the sheriff says in this case."

My Lords, that was also what the sheriff-substitute said in the present case, and, in my opinion, he rightly said so. I may add that I agree with the Second Division in deprecating any attempted exclusion of the function of a Court of Appeal by refusing to state a real question of law. In that there would be a danger of usurpation. Yet there is, of course, also a danger on the other side, as for instance should Courts of Appeal usurp that arbitrament on fact which the Legislature has placed exclusively elsewhere. Taking it, however, that the amended tenth finding in the present case stands as one which it is competent for the Court to consider, I think that the true question is, Has some legal error in the mind of the sheriff-substitute caused him so to misdirect himself as to lead him to a wrong inference upon the facts found by him?

My Lords, as has been so clearly pointed out in the judgment of my noble and learned friend Lord Atkinson, the scene of duty of the deceased workman was the Granton Quay and each of

the four trawlers moored near it, and the performance of his duty included in point of fact his movements from the boat or boats to the shore and vice versa. The Lord Justice Clerk's judgment appears to rest upon an inference that this fatal accident occurred while the workman was absent from the scene of his duty. He remarks: "The essential part of his duty was to watch, and it was impossible that he could fulfil that duty by leaving his post and going to a public-house. The moment he left the subject which he was to watch he was no longer in the course of his employment." He further adds: "The moment he left he ceased to be in the course of his employment. When he was going back he was not in the course of his employment, because he had no right to be away."

Taking the facts, however, as I am bound to and very willingly do from the findings of the sheriff-substitute, it appears that while this workman, engaged for a continuous spell of twenty-five hours, had no doubt been absent from the harbour "a short distance" "for a very short time," he had actually, before the accident occurred, returned to the quay, namely, to the scene of his employment, and he was in the act of proceeding from the quay to one of the trawlers. The case, however, has been treated as if some deviation, with results analogous to those known in shipping law, had taken place, which involved some impairment of right after the deviation had ceased. I cannot hold that this is sound. The case is in my opinion completely distinguishable from *Reed* v. *Great Western Ry. Co.* (1) and *McDonald* v. *Owners of Steamship Banana* (2), where the accident took place while the workman was absent from the scene of his duty. It seems to me to be within the principle of *Robertson* v. *Allan Brothers & Co.* (3), a case which, in my opinion, was rightly decided, and the authority of which was recognized in *Moore* v. *Manchester Liners, Ld.* (4)

I am of opinion that the finding and award of the sheriff-

(1) [1909] A. C. 31.
(2) [1908] 2 K. B. 926.
(3) 98 L. T. 821.
(4) [1909] 1 K. B. 417.

H. L. (Sc.) 1909

LOW OR JACKSON v. GENERAL STEAM FISHING COMPANY, LIMITED.

substitute should stand, these not having been grounded on any error in law.

Ordered that the interlocutor of November 7, 1908, *appealed from be reversed, together with the administrative interlocutor of the sheriff-substitute following thereon of date December* 2, 1908; *that the award of the sheriff-substitute of July* 8, 1908, *be restored; and that the respondents do pay the appellant the costs of the action in the Court of Session and of the proceedings in the Sheriff Court from and after the* 8*th day of July,* 1908, *and also the costs incurred by her in this House, such costs to be taxed in the manner usual when the appellant sues in forma pauperis.*

Lords' Journals, July 29, 1909.

Agent for appellant: *Herbert G. Davis, for James Burnet Mackie, Solicitor, Edinburgh.*

Agents for respondents: *Pritchard & Sons, for F. J. Martin, W.S., Edinburgh, and James Wallace, Sunderland.*

[PRIVY COUNCIL.]

COREA . . . . . PLAINTIFF;

AND

PEIRIS . . . . . DEFENDANT.

J. C.*
1909
Feb. 9, 10, 11; *May* 11.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Action for Malicious Prosecution—Onus probandi.

Held, that under Roman-Dutch as well as English law a prosecution instituted without malice and with reasonable and probable cause does not amount to an act of aggression; that an animus injuriæ (malice) cannot be inferred from the mere fact that the prosecution has failed; and that the onus of proving malice rests on the plaintiff.

In an action for malicious prosecution against the respondent in that he had charged the appellant with theft, criminal trespass, and the forcible removal of his goods it appeared that the real charge was that of criminal trespass, that the conversion of the charge of removal of goods into that of theft was not done recklessly, that the respondent took action under legal advice in defence of his title to his property in the bona fide belief that the appellant had trespassed and forcibly removed his goods, and that there was no proof of indirect motive or malice of any kind on the respondent's part:—

Held, that the Appellate Court was right in reversing the District Judge's decree for damages, and that the appeal therefrom must be dismissed.

APPEAL from a decree of the Supreme Court in review (October 2, 1907) affirming its judgment in appeal (August 27, 1906) which reversed a decree of the District Court of Kurunegala (April 20, 1906).

The plaint alleged that the respondent on or about March 4, 1904, complained to the police magistrate of Kurunegala that the appellant had on February 4, 1904, with a large force of men, entered upon the land called "Madugas Agare," situate in the district of Kurunegala, and committed the offence of trespass, theft in respect of property to the value of Rs.800, and mischief, besides being a member of an unlawful assembly whilst committing the said offence; that upon the hearing of the complaint the appellant was acquitted and discharged; and that the respondent

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

J. C. 1909. COREA v. PEIRIS.

made the complaint and charged the appellant with having committed the offence falsely and maliciously and without reasonable or probable cause.

The respondent's answer, in addition to formal traverses, stated that in February, 1904, the respondent received information that the appellant and a gang of men had forcibly entered upon a cocoanut estate belonging to the respondent, had committed mischief, and had removed property belonging to the respondent, and that the respondent, acting in the bona fide belief in the truth of the said information, directed that the wrong-doers should be criminally prosecuted.

At the trial the respondent tendered as a witness Mr. Schneider, whom he had consulted at every step before instituting the criminal proceedings in question, and who was acting as his counsel, though not actually conducting this case. The District Judge held that he was not competent to give evidence; and eventually awarded to the appellant Rs.10,000 damages. He came to the conclusion that the respondent had no reasonable grounds for believing the information given him, that he ought to have taken steps to satisfy himself of the truth of the charges, and that there was sufficient material before the Court to establish dolus malus.

The Supreme Court on appeal admitted Mr. Schneider's evidence and reversed the judgment of the District Judge. The judges agreed in holding that the plaintiff had failed to establish either malice or absence of reasonable and probable cause.

De Gruyther, K.C., and *R. W. Lee* (*E. W. Perera*, of the Ceylon Bar, with them), for the appellant, contended that on the evidence the District Judge's findings were right, and that it was proved that the charges made by the respondent were false, and that they were made maliciously and without reasonable and probable cause. It was further contended that by the law of Ceylon the appellant, having been discharged and acquitted of criminal trespass, theft, and other crimes falsely charged against him by the respondent, was entitled to damages. Roman-Dutch law differs from that of England in regard to cases of this kind. Under the latter the plaintiff must prove malice and absence of

reasonable and probable cause; under the former it is only necessary to prove the charge and its dismissal, the onus being on the defendant to prove its truth. For the Roman-Dutch law on the subject reference must be made to the definitions of injuria contained in Digest 47, 10, 1, 1, which includes many different heads of tort, amongst others malicious prosecution: see Digest 47, 10, 13, 3. Injuria in this connection means implied malice as in the English law of libel. Reference was also made to Van Leeuwen, Censura Forensis, 1, 5, 25; Vinnius ad Instit., 4, 4, 7; Maasdorp's Translation of Introduction to Dutch Jurisprudence by Grotius, bk. 3, c. 36; Voet ad Pandectas, 47, 10, 7, 9; Gaill, Practicæ Observationes, 2, 99, 7, and 2, 101, 6. With regard to reported cases see Neostadius, Curiæ Holland. decis. 44 (de rebus ex naufragio servatis); Strykius, Tractatus de actionibus forensibus, 1, 10, 51, de injuria per processum illata; Sande, Decisiones Frisicæ, 5, 8, 11. Roman-Dutch law was preserved in Ceylon by the Proclamation of September 23, 1799; and see Ordinance 5 of 1852, s. 5, extending the law of the Maritime Provinces to the Kandyan districts. The Ceylon cases of *Moss* v. *Wilson* (1), *Christiana* v. *Andiappa Pulle* (2), *Meedin* v. *Mohideen* (3), *Podi Sinno* v. *Appuhamy* (4), and the Natal cases of *Cottam* v. *Speller* (5) and *Natal Land and Colonization Co.* v. *Schussler* (6) were referred to.

F. E. Simon, K.C., and *Dornhorst, K.C.* (*James Peiris* and *Geoffrey Lawrence* with them), for the respondent, contended that on the evidence he had reasonable and probable cause for prosecuting the appellant, and had acted honestly in the belief that the information laid before him was true and on legal advice, and not in pursuance of any malicious, indirect, or improper motive. The law in force in the island of Ceylon does not differ from the English law and casts on the plaintiff in such an action as this the onus of proving that his prosecutor acted maliciously and without reasonable and probable cause. That onus was not discharged. Reference was made to the Criminal Code, Order XV. of 1898, c. 15, ss. 148, 149, 151; c. 16, ss. 155, 156, and 157;

(1) (1906) 8 N. L. R. 368.
(2) (1898) 1 Balasingham, 58.
(3) (1897) 3 N. L. R. 27.
(4) (1904) 3 Balasingham, 145.
(5) (1882) 3 Natal L. R. N. S. 130.
(6) (1884) 5 Natal L. R. N. S. 10.

J. C. 1909 COREA v. PEIRIS.

Courts' Ordinance, 1899; *Moss* v. *Wilson.* (1) Pereira's Inst. of Laws of Ceylon, vol. 1, p. 13, shews that the whole of Dutch law as it prevailed in Holland was never bodily introduced: and see *Wijeyskoon* v. *Goonewardene.* (2)

De Gruyther, K.C., in reply.

1909 *May* 11.

The judgment of their Lordships was delivered by

Lord Atkinson. This is an appeal from a judgment of the Supreme Court of Ceylon (in review) dated October 2, 1907, affirming its judgment on appeal dated August 27, 1906, whereby a judgment pronounced by the District Court of Kurunegala on April 20, 1906, in the plaintiff's favour was reversed.

The action, which was instituted by the appellant in the District Court, was one for malicious prosecution on a charge of criminal trespass and theft.

As their Lordships understand the judgment appealed from, the Supreme Court held that a prosecution instituted without malice and with reasonable and probable cause cannot, under the Roman-Dutch law, be held to amount to an act of aggression; that an animus injuriæ in the prosecutor cannot, therefore, be inferred from the mere fact that the prosecution has failed and the accused been acquitted; that the burden of proving the existence of this animus injuriæ (i.e., malice) rests, under the Roman-Dutch law as under the English law, on the plaintiff in such an action; and that the principles of the two systems of law on the subject are practically identical. The various authorities to which their Lordships have been referred fully sustain, in their opinion, the several conclusions at which the Supreme Court has arrived on these points.

The appellant and respondent have conflicting claims to an undivided half of certain land, called "Madugas Agare," situate in the above-mentioned district. The respondent claims as the assignee of the donee of a lady named Gunemal Etana, and the appellant as the assignee of a subsequent donee of the same lady, she having revoked her first deed of gift and made a second. The appellant is an advocate of the Supreme Court of Ceylon. He resides at Chilaw, in that island, and practises his profession

(1) 8 N. L. R. 368. (2) (1892) 2 Ceylon L. R. 59.

in the District Court which sits there. He is a member of a respectable family and is possessed of considerable lands in the neighbourhood of Chilaw. Notwithstanding this, he has, as the District Judge finds, appeared three times in a criminal Court of justice charged with criminal trespass. In one of these cases he made counter-charges against his accuser, and both charges were withdrawn. In the two others the charges were dismissed. In the first-mentioned instance the charge was made by one Usubu Lebbe, acting on behalf of the respondent, in respect of an alleged forcible trespass on some other land of the respondent situate in the same district as that in which "Madugas Agare" is situate. The prosecution was withdrawn on the terms that the appellant should bring an action in a civil Court to try, as between him and the respondent, the question of title to the lands, in default of which the respondent was to be at liberty to institute fresh criminal proceedings. The appellant accordingly instituted a suit apparently for that purpose, not, however, in the Court of the district in which the lands were situate, which would have had jurisdiction to entertain the suit, nor yet in the Court of Colombo, where the respondent resided, but in the Chilaw District Court, which had no jurisdiction to entertain the suit. This was not only a breach of the arrangement to which the parties had come, but looks rather like an unworthy and somewhat contemptible trick on the appellant's part; since it is impossible to suppose that he was so ignorant of the powers and procedure of the Court in which he practised as to believe that such a suit could be entertained by it. Subsequently the respondent instituted a possessory action against the appellant in respect of the same lands, and an appeal to the Supreme Court in that action was pending at the time the prosecution complained of was instituted. Such being the character and conduct of the appellant, it was not at all unnatural or unreasonable, in one who knew him as the respondent did, to conclude that he was a man perfectly capable, when occasion arose, of attempting to assert his title to land by the method of deliberate and forcible trespass. Nor, indeed, could the idea that he might remove by force from land claimed by him any property of the rival claimant which he might find

J. C. 1909 COREA v. PEIRIS.

upon it, for the purpose of asserting his claim, though not for the purpose of ultimately appropriating the property to his own use, be regarded as wild or extravagant.

The respondent resides in Colombo, which is some considerable distance from the Madugas Agare estate. He is possessed of considerable household property, which he manages himself, as well as of cocoanut plantations and other lands situated in the districts of Kurunegala and Chilaw. These latter, which he visited generally once a year, though sometimes only once in two years, were managed for him by his cousin, Joseph Peiris, under a power of attorney, enabling the latter not only to manage the lands in the ordinary course, but in addition to purchase other land and compromise disputes concerning it.

Joseph Peiris lives at a place called Natandiya, about fifteen miles from Madugas Agare. He is a man between fifty and sixty years of age, and has been an invalid for many months, suffering from dropsy, for which he has been operated on several times. He had, as the respondent's agent, purchased the lands of Madugas Agare bit by bit on his principal's behalf. They were on October 13, 1899, formally conveyed to the respondent, and had remained in his undisturbed possession for a period of ten or twelve years. Joseph Peiris, who had been in the employ of the respondent and his father for many years, was assisted in the management by Ismail Meera Lebbe, described as the conductor of Madugas Agare, who had been in the service of the respondent and his family for thirty years, and also by one Usubu Lebbe, a moorman, who had been in the same service for twenty-seven years. The respondent swore that he trusted these three men and relied on their veracity. In the month of September, 1902, he received a letter, dated the 3rd of that month, purporting to have been written, on the instructions of the appellant, by his proctor, Mr. Martin, in which the respondent was asked if he was willing to give up to the appellant possession of the portion of Madugas Agare in dispute, on receiving compensation for any improvements he might have made thereon, and threatened that, in the event of refusal, an action for the recovery of possession would be brought against him. The respondent forwarded this letter to Joseph Peiris,

who, on receiving it, entered into negotiations with Martin for the settlement by arbitration of the appellant's claim. Nothing came of the negotiations, but Joseph Peiris swore at the trial that, fearing that the respondent would, on finding this litigation threatened, be annoyed with him for having purchased lands with a defective title, he concealed from the latter everything connected with the negotiations. And the respondent swore that from the time he forwarded Martin's letter to his cousin he heard nothing more about the appellant's claim, or about any negotiations concerning it. The evidence of both these witnesses is uncontradicted on these points.

This was the condition of things which existed before and at the time when the events leading up to the prosecution complained of occurred.

The District Judge seems to have been fully aware that in an action for malicious prosecution the law throws upon the plaintiff the burden of proving the presence of malice in the mind of the prosecutor and the absence of reasonable cause for the prosecution; but he appears to have been led into error by not keeping steadily before his mind the fact that the pivot upon which almost all such actions turn is the state of mind of the prosecutor at the time he institutes or authorizes the prosecution. If he receives information from others and acts upon it by making a criminal charge against any person, the motives of his informants, or the truth, in fact, of the story they tell, are to a great extent beside the point. The crucial questions for consideration are: Did the prosecutor believe the story upon which he acted? Was his conduct in believing it, and acting on it, that of a reasonable man of ordinary prudence? Had he any indirect motive in making the charge? The District Judge, it would appear to their Lordships, seems to have confounded the motives and action of Joseph Peiris with the motives and action of the respondent, the truth, in fact, of the information conveyed to the respondent, and the motives of those who conveyed it, with the respondent's belief in what he heard and his prudence in acting on it, and to have condemned the respondent to pay Rs.10,000 damages on inferences drawn from the combined result.

The facts other than those already mentioned which were

J. C. 1909 COREA v. PEIRIS.

proved in evidence, so far as it is necessary to state them, are as follows. On the afternoon of a certain day, which is said to have been February 4, 1904, a message was brought to Joseph Peiris, who was then ill and confined to bed, by a moorman by name unknown to him, that the appellant, accompanied by a large number of men, had entered upon the land of Madugas Agare, broken into the bungalow erected thereon, broken some of the furniture and effects in it, carried away others, and driven away some goats. On the following day Meera Lebbe arrived at Joseph Peiris' residence and gave a fuller account of the transaction, of which he professed to have been an eye-witness. Thereupon Joseph Peiris, thinking it was Meera Lebbe's business to institute proceedings, as he was in charge of and responsible for the property removed, directed the latter to get a report from the headman who, Lebbe stated, was a witness of the affair, and, to use his own words, "put in a case." Joseph Peiris also stated that he believed he wrote to the respondent a letter informing him of what had occurred; but the letter was not produced, nor did the respondent admit the receipt of it. Joseph Peiris further stated that he got alarmed lest there should be a recurrence of the disturbance, and sent a telegram to the Government Agent and Assistant Government Agent at Chilaw in reference to the transaction. This telegram is not to be found in the record. The Assistant Government Agent, Mr. Bertram Hill, who was examined as a witness at the trial, purports to state its contents. He said: "I received a telegram from one Peiris complaining that Mr. Victor Corea with some men had got into a land and committed theft, criminal trespass, &c., &c."

It is not clear, however, whether these were the precise words of the telegram, or the charge ultimately framed upon it. The telegram which he himself subsequently sent to the police magistrate at Chilaw in respect of it suggests the latter. It ran thus: "Any truth in reported riot by Corea on Madugas Agare estate belonging to Peiris? Is my presence required?"

On the following day Usubu arrived at Joseph Peiris' house. Meera Lebbe was then about to return to the estate of which he was in charge. Joseph Peiris directed Usubu to accompany Meera and inquire into the transaction. Usubu did so. He

saw, he stated, that the door of the bungalow was broken, that the rice box and some cups and plates were also broken, and that the furniture had been removed. Mr. Joseph Peiris stated that Usubu returned to him and confirmed Meera Lebbe's report. Usubu stated that he went to Colombo to see the respondent on February 7 or 8; that he informed him of what had taken place, namely, that "Mr. Corea's people had come and committed this damage," gave him full particulars, and accompanied him to the house of his advocate; that, after the interview with the advocate, he took a message from the respondent for Meera Lebbe to the effect that, as he (Meera) was responsible for the things stolen, he must himself prefer the complaint against the appellant; and that he (Usubu) returned from Colombo to Natandiya, Mr. Joseph Peiris' residence, on February 9 or 10, only to find that Meera Lebbe had already gone to Kurunegala to institute a prosecution. The respondent stated in his evidence at the trial that he knew nothing of the telegram sent to the Government Agent, nor of the proceedings consequent upon it, till the hearing of the charge against the appellant. On this point his evidence was not contradicted. The advocate to whom the respondent went for advice, accompanied by Usubu Lebbe, was Mr. Schneider, a gentleman apparently of position in his profession, whose evidence was not impeached. He was tendered as a witness for the respondent at the trial, but the District Judge ruled, on some quite unsustainable ground, that, being the respondent's advocate, his evidence was inadmissible. The Supreme Court most properly, in their Lordships' opinion, permitted him to be examined.

His evidence is most important. It supplies the explanation of much that occurred. He states that the respondent came to him, accompanied by Usubu; that the former then said that Mr. Corea and a number of other men had gone to one of his estates, raided the bungalow, smashed furniture, and removed certain things, including goats; that the respondent consulted him as to what he was to do; that he (Schneider) asked the respondent what evidence was available, to which the latter replied that "coolies, kanganies, and the

J. C.
1909
COREA
v.
PEIRIS.

native headman had been brought to the spot and could give evidence"; that he (Schneider) told the respondent it was well worth considering whether he should bring a criminal action; that the respondent then stated that Usubu was an old servant, that Meera Lebbe had been with him forty years, and that he relied upon them; that he (Schneider) asked the respondent if he thought Corea could be guilty of such a thing, to which the latter replied that Corea had years before seized fifty acres of one of his (Peiris') estates, and that "if gentlemen learned in the law behaved so how can we poor people get on"; that the respondent was very much alarmed when he saw him first, and said that, unless he took steps, "there was no protection for any of his estates in that district"; that he (Schneider) advised the respondent to bring a charge in the police court of Kurunegala; that he did not think he advised him to bring any particular charge, but to lay the facts before the police magistrate, who would frame a charge. The respondent and Usubu then left. The respondent paid another visit to Mr. Schneider some days later. But, before dealing with Mr. Schneider's evidence as to what took place at the second interview, it is necessary to refer to what occurred before the police magistrate at Kurunegala in the interval. Meera Lebbe had, in pursuance of the directions of Joseph Peiris, obtained a report from the native headman on the occurrence of February 4, which the latter had witnessed. Armed with this report, he went to a gentleman named Markus, a proctor of the District Court of Kurunegala, who had been in practice for thirty years and of whom the respondent was a client, to instruct him on his (Meera's) own behalf to institute proceedings against the defendant and others for criminal trespass on the respondent's lands. Mr. Markus, who was examined on behalf of the respondent at the hearing of this action, and whose evidence was not impeached, directed Meera to lodge this report with the clerk of the police court, who, according to the practice of the Court, would translate it and lay it before the police magistrate. The magistrate had, however, left Kurunegala to hold an inquiry elsewhere, and Meera Lebbe, by direction of Mr. Markus, returned on February 16, when his evidence was taken, Mr. Markus appearing for him. No charge was then formulated, and it is

clear from the evidence then given by Meera Lebbe that the respondent had made no charge on his own behalf, and that Meera's accusation against the appellant was that which he had already made to Joseph Peiris, namely, that the appellant had come with a number of people, broken into the bungalow, and removed therefrom the defendant's property. What they did with this property he said he did not know. The police magistrate, however, refused to proceed further without the evidence of the respondent. Mr. Markus thereupon sent Meera Lebbe to the respondent with a letter requesting that Mr. Schneider should appear in the case, together with a report of the proceedings before the police magistrate. The respondent stated that until he saw Meera on this second occasion he was entirely unaware of the step which had been taken by the latter. He thereupon, accompanied by Meera Lebbe, waited upon Mr. Schneider and laid before him the report of the proceedings in the police court, which he had received from Mr. Markus, together with the latter's letter. Mr. Schneider, in giving evidence, stated that on this second occasion he (Schneider) questioned Meera Lebbe, and that he thought he must have asked the respondent if the appellant had any claim upon the estate, and that, if he did, the respondent must in reply have said "none." He added that he appeared for the respondent in the subsequent proceedings before the police magistrate, and that, when the latter asked him under what section of the Penal Code he charged the appellant, he believed he "led him as to the substance of the charge." Mr. Schneider, in answer to the Court, added: "I did personally believe that Mr. Corea might have committed theft, that he was likely in execution of his project to allow his followers to carry away anything that came in their way, fowls, &c. I believed his real object was simply to obtain possession of the estate, and he was responsible for taking away the goods, though it was not his primary object to do so."

The respondent appeared before the police magistrate on March 18. He detailed what he had heard from Usubu and Meera Lebbe. He stated that the appellant had no claim to the lands, and did not advance any claim to them; that he had cases with the appellant about other lands, in one of which an

J. C.
1909
COREA
v.
PEIRIS.

appeal was pending; and that he thought the appellant had done what he was accused of on account of this appeal. He then added: "I charge Mr. Corea with the criminal offence of theft of the furniture of the house and the property of the estate and the goats, amounting in all to about Rs.800. I charge Mr. Corea with having committed criminal trespass by entering into my estate, and with having removed therefrom my property."

Upon this evidence being given, the magistrate made the following order: "Issue summons to the accused named in the headman's report, sections 369, 433, 437, Ceylon Penal Code."

It is clear upon the above evidence that the real charge which the prosecutor wished to have preferred against the appellant was that of criminal trespass, since he looked upon the trespass as an act directed against his title to and ownership of these and possibly other lands in the district. The conversion of the charge of the removal of the goods into the charge of the theft of them was very much due to Mr. Schneider's having "led" the magistrate, as he called it, into throwing the charge into that shape. And from one passage in the respondent's evidence on cross-examination it is plain that an idea something like that which ran through Mr. Schneider's head—namely, that the appellant should be held responsible for the thefts of those who accompanied him, though he himself was personally incapable of thieving—ran through his head also. The passage runs: "I did not think Mr. Corea capable of committing theft—personally, I am not capable of such an offence."

In the result, therefore, the respondent proved that he believed the story his old and trusted servants had told him; that he consulted his legal advisers at every step; and that he took action in defence of his title to his property, in the bona fide belief that the appellant had trespassed on his land and forcibly removed his goods. The case made against him is that he could not have believed, or should not have believed, without much stronger proof, that Mr. Corea was capable of committing a theft, and that he acted recklessly in accusing him of having committed it.

Their Lordships think that, having regard to all that occurred, and to the way in which it came about that that charge of theft was formulated, there was nothing reckless in the respondent's conduct with regard to it, nor, upon the evidence already dealt with, is there any proof of indirect motive, or malice of any kind, on the respondent's part. The District Judge, however, discovered proof of malice in two incidents not hitherto referred to—first, the fact that the charge was made pending the hearing of the appeal in the civil suit; and second, the statement made by the respondent that the appellant had no claim to the lands. The charge was made, he concludes, to prejudice the minds of the judges who were to hear the appeal against the appellant—a wild and far-fetched suggestion which there is nothing in the case to justify—and the denial of the appellant's claim was, he thought, intended to blacken the appellant in the eyes of the police magistrate. Their Lordships are unable to understand how the fact of the appellant having a claim to the lands could lessen in any way the moral or legal culpability of the conduct of which he was accused. Their Lordships think it unnecessary to consider the question of the alleged mala fides of Joseph Peiris in sending the accusing telegram, or Usubu's alleged dishonest efforts to bring about a settlement of the claim to the land, or of the prosecution, or the withdrawal, of the charge against Joseph Peiris, whichever it be, though the District Judge seems to think them relevant and worthy of consideration. They are outside this case, as the respondent was no party to them and knew nothing of them. Their Lordships are further of opinion that the Supreme Court acted quite rightly in refusing to permit a new case to be made on the hearing on review, on the supposed analogy of *Cornford* v. *Carlton Bank*.(1) As above pointed out, the District Judge had not the advantage of hearing Mr. Schneider's evidence, which no doubt produced a great impression on the Supreme Court. On the whole, therefore, their Lordships concur with the Supreme Court in holding that there is not sufficient proof that the respondent was actuated by malice or that there was not reasonable and probable cause for the

(1) [1899] 1 Q. B. 392.

J. C. 1909 COREA v. PEIRIS.

prosecution. They will therefore humbly advise His Majesty that the appeal should be dismissed.

The appellant must pay the costs of the appeal.

Solicitors for appellant: *Clarke, Rawlins & Co.*

Solicitors for respondent: *Stephenson & Harwood & Co.*

[PRIVY COUNCIL.]

J. C.* 1909 *Feb.* 4; *May* 11.

OWNERS OF AND PARTIES INTERESTED IN STEAMSHIP MAORI KING . . . . } DEFENDANTS;

AND

HIS BRITANNIC MAJESTY'S CONSUL-GENERAL AT SHANGHAI, SIR PELHAM L. WARREN, K.C.M.G. . . . . } PLAINTIFF.

ON APPEAL FROM HIS MAJESTY'S SUPREME COURT FOR CHINA AND COREA AT SHANGHAI.

Merchant Shipping Act, 1894, *ss.* 69, 76—*Merchant Shipping Act*, 1906, *s.* 51—*Decree of Forfeiture of Ship—Supreme Court of China and Corea—Jurisdiction.*

The Supreme Court of China and Corea at Shanghai decreed the forfeiture for improperly carrying British colours of a ship owned by Russians which had been registered at Shanghai in the name of a British subject:—

Held, that as the Supreme Court at Shanghai was not within British territory it had no jurisdiction to make the decree. Sect. 76 of the Merchant Shipping Act, 1894, confers the jurisdiction exercised upon no Court except within the dominions of the Crown, and there is no statutory authority extending the jurisdiction thereunder to the Shanghai Court.

APPEAL from a decree of the Supreme Court at Shanghai (April 23, 1908) which pronounced that the *Maori King*, seized and detained by the respondent, is subject to forfeiture to His Majesty under the provisions of s. 51 of the Merchant Shipping Act,

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ARTHUR WILSON.

1906, and under the provisions of s. 69 of the Merchant Shipping Act, 1894, and condemning the ship *Maori King*, her tackle, apparel, and furniture, to be forfeited to His Majesty, his heirs and successors, accordingly.

One James Markham Dow, a British subject, became the purchaser of the said ship in March, 1906, registered it in the port of Shanghai on March 28, 1906, as a British ship owned by himself, and on December 30, 1906, executed a declaration of trust in favour of Ginsburg & Co., a Russian firm, who were found by the Supreme Court to be the beneficial owners thereof.

On January 4 and 6, 1908, the respondent filed two petitions. The former, which was founded on s. 51 of the Merchant Shipping Act, 1906, stated that he was on November 25, 1907, and had been ever since, the Registrar of Shipping at Shanghai, exercising the powers of a British officer of the Board of Trade within the intent and meaning of that section. The latter, which was founded on ss. 69 and 76 of the Merchant Shipping Act, 1894, stated that he was Consul-General at Shanghai and a British Consular officer within the meaning of s. 76.

The material averments contained in the petition of January 4 were—(1.) that "His Majesty's Minister at Peking being considered in pursuance of the China and Corea (Shipping Registry) Order in Council article 12 in all respects as occupying the place of the Board of Trade and the Commissioners of Customs for the purposes of the Merchant Shipping Act 1906 section 51 having a doubt as to the title of the ship the subject-matter of this action registered as a British ship at Shanghai to be so registered in accordance with all powers him thereto enabling directed the plaintiff as such registrar as aforesaid to require evidence to be given to his satisfaction that the said ship was entitled to be so registered as a British ship"; (2.) that the respondent caused a notice to be served in accordance with the said s. 51, and after certain proceedings seized and detained the said ship as having become subject to forfeiture to His Majesty as aforesaid, and had brought her for adjudication before the Supreme Court in Shanghai pursuant to Part I. of the Merchant Shipping Act, 1894.

The material averments contained in the petition of

J. C. 1909

THE S.S. MAORI KING.

January 6 were that "in pursuance of directions from His Majesty's Minister at Peking one Archibald Rose the British pro-Consul in charge of the shipping office at His Britannic Majesty's said Consulate-General at Shanghai held an inquiry" during the course of which it appeared (1.) that "a Russian firm trading as M. Ginsburg & Co. as owners had in fact chartered the said vessel to an American firm trading as S. Zimmerman & Co."; (2.) that "the persons on board and in charge of the said ship during the said voyage above referred to used the British flag and assumed the British national character on board the said ship" for a wrongful purpose; (3.) that the respondent "as such British Consular officer has seized and detained the said ship as having become subject to forfeiture under section 69 sub-section 1 of the Merchant Shipping Act 1894 and has brought her for adjudication before this Court pursuant to Part I. of the said Act."

The defence to the writ of January 4, 1908, stated circumstances which it was contended rendered it unjust and contrary to equity to inflict the penalty of forfeiture, which, moreover, was without precedent, although for fifty years the law had been in force and repeatedly transgressed. The defence to the later writ alleged that the appellants were "honestly under the impression that they were entitled to use the British flag and assume the British national character on the ship, in pursuance of such registration as aforesaid," meaning its registration in the Registry of British Shipping at Shanghai in the name of a British subject.

In its judgment the Supreme Court said that the respondent, besides being Consul-General at Shanghai, had been appointed Registrar of Shipping of the port of Shanghai under the China and Corea (Shipping Registry) Order in Council, 1904, and that His Majesty's Minister in China occupied the place of the Board of Trade and the Commissioners of Customs. With regard to the duty of the Court it said: "It has been contended for the Crown that on the authority of *The Annandale* (1) the ship is subject to forfeiture on the commission of the offence and that

(1) (1877) 2 P. D. 179, 218, 220.

actual forfeiture must accrue on the Court being satisfied that the claimants have proved that the ship has been the subject of any of the illegal acts which call for her forfeiture. For the defendants it is urged that the change of the words in the Act from 'shall be forfeited' to 'shall be subject to forfeiture' must indicate an intention of the Legislature that the Court should exercise its discretion as to whether it would give weight to questions of hardship which under the Act of 1854 could, as James L.J. points out in *The Annandale* (1), be taken into the merciful consideration of the Crown. I am bound to say that this consideration weighed heavily with me, but on mature consideration I have come to the conclusion that the object of the change in the Act is to defer the forfeiture until judgment, so that a possibly unwitting breach of the law may not imperil valuable property in a ship, or that an innocent bona fide purchaser may not lose his property, because the ownership has been divested by operation of law. *The Annandale* (1) was decided on the words of the statute of 1854; this case must be decided on the words of the statute of 1894. There have been no cases under section 76, but a consideration of the words of that section has led me to the conclusion that I must make the order prayed for by the Crown."

Sir R. Finlay, K.C., Scrutton, K.C., and *Cowell,* for the appellants, contended that the Supreme Court at Shanghai did not possess the jurisdiction which it had exercised and that its decree of forfeiture should be reversed. The jurisdiction which it had assumed was in excess of the jurisdiction which the Emperor of China has in derogation of his sovereign rights granted to the British Crown, the Treaty of Tientsin (June 26, 1858) (2) limiting the grant to questions between British subjects. The China and Corea Order in Council, 1904 (3), on its true construction does not purport to assign, and could not assign, to the Supreme Court thereby constituted the jurisdiction which it has exercised, and does not contain any provisions and regulations for that purpose. The Merchant Shipping Act, 1894, s. 76,

(1) 2 P. D. 179, 218, 220.
(2) Hertslet's Treaties, vol. xi., p. 89, arts. 15 and 16.
(3) St. R. & O., 1904, p. 193.

J. C. 1909

THE S.S. MAORI KING.

which creates the jurisdiction, precludes its exercise by an extra-territorial Court, and vests it exclusively in a Colonial Court of Admiralty or Vice-Admiralty Court in His Majesty's dominions, a provision which excludes the Court at Shanghai.

With regard to the first petition, based on the Merchant Shipping Act, 1906, s. 51, it was further submitted that that section empowers only the Board of Trade to direct the Registrar of Shanghai to institute the inquiry made in this case. The direction given in this case was by Sir John Jordan, His Majesty's Minister in China, reciting therein that it was given by virtue of the powers delegated to him by art. 12 of the China and Corea Shipping Registry Order in Council and by the said s. 51. It was submitted that it was neither the intention nor the effect of art. 12 to modify the express provision of s. 51, and that the direction given and inquiry held in this case were without legal authority. With regard to the second petition, based upon s. 69 of the Merchant Shipping Act, 1894, it was further submitted that that section is inapplicable to the circumstances, and that if any section were applicable it would be s. 71, which deals with beneficial ownership.

The point, however, which was principally argued in the Court below was that on the true construction of s. 76 of the Merchant Shipping Act, 1894, the Court should exercise discretion in deciding whether forfeiture should be decreed, and that in the circumstances of this case it was right that such discretion should be exercised in favour of the appellants. In the present appeal it was contended that the whole of the proceedings of forfeiture were without legal authority and were coram non judice and a nullity, and that although the submissions as to jurisdiction were not presented to the Supreme Court, yet its decree should be reversed. Reference was made to *Meenakshi Naidoo* v. *Subramaniya Sastri* (1); and to *Imperial Japanese Government* v. *P. and O. Co.* (2) as to the necessity of restricting the exercise of jurisdiction in foreign territory by the terms of the treaty concluded with its sovereign: see Sir H. Jenkyns' British Rule and Jurisdiction beyond the Seas, p. 153.

(1) (1887) L. R. 14 Ind. Ap. 160, 166, 167.

(2) [1895] A. C. 644, 658, 659.

J. C.
1909
THE S.S. MAORI KING.

Sir W. S. Robson, A.-G., Sir S. T. Evans, S.-G., and *Rowlatt*, for the respondent, contended that the appellants were precluded from disputing the jurisdiction of the Supreme Court. They had waived the point in the Court below and by their conduct they had deliberately placed the case under its jurisdiction. They put forward a British subject to make a false declaration and thereby put the ship on a British register. The liability of Dow was the liability to be enforced, and as he did not appear the appellants intervened and voluntarily submitted to the jurisdiction, invoking its exercise in their favour in order to release the ship. With regard to jurisdiction, although the treaty did not say anything about foreigners, there was the Foreign Jurisdiction Act of 1890, which deals with cases outside the treaty and recognizes jurisdiction as acquired by usage, sufferance, and other lawful means. There was a customary jurisdiction established at Shanghai, and so long as it was not disallowed it could be exercised. The Order in Council No. 1656 of 1904, which constitutes the Supreme Court, provides for jurisdiction over foreigners: see arts. 5, 100, and 151. The Court did not require from the appellants a consent in writing under art. 151, for the appellants did not raise the point; the case was being contested as against Dow and was regarded both by the Court and by the parties as a proceeding against a British subject. The Foreign Jurisdiction Act (see s. 4 and s. 9) dealt with Colonial Courts and Courts established out of British possessions, and having regard to its terms it cannot be said that the Order in Council was ultra vires.

Sir R. Finlay, K.C., in reply.

1909
May 11.

The judgment of their Lordships was delivered by

Sir Arthur Wilson. This is an appeal from a judgment and decree of His Majesty's Supreme Court for China and Corea at Shanghai, which declared the steamship *Maori King* to be forfeited for improperly carrying British colours.

Several grounds of objection to that judgment and decree were urged upon the argument of the appeal. The principal ground of objection went to the jurisdiction of the Court; and as, in the opinion of their Lordships, that objection is sufficient to dispose

J. C. 1909

THE S.S. MAORI KING.

of the appeal, they deem it unnecessary to consider the other points argued.

The facts so far as they are material for the present purpose can be briefly stated. The *Maori King* was purchased in March, 1906, in the name of one Dow, and registered at Shanghai in Dow's name; but he executed a declaration of trust in favour of a Russian firm, Ginsburg & Co., who have been found to be the real owners.

On January 24, 1908, the respondent, His Majesty's Consul-General at Shanghai, filed two petitions, founded on two writs, dated respectively January 4 and 6, 1906, which he had caused to be issued against the appellants. Of these petitions the second is the more material. It was based upon ss. 69 and 76 of the Merchant Shipping Act, 1894. It stated that the plaintiff, as Consular officer within the meaning of s. 76, had seized and detained the ship, as liable to forfeiture under s. 69, for having used the British flag without authority to do so; and the petition asked (amongst other things) for a declaration and judgment that the ship had become forfeited to His Majesty.

Certain defences were raised which it is not necessary to examine on the present occasion.

On April 23, 1908, a decree was passed declaring the forfeiture of the ship as prayed. That is the decree appealed against.

The sections which it is important to notice for the present purpose are as follows:—

Merchant Shipping Act, 1894. Sect. 69: "(1.) If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear to be a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right."

Sect. 76: "(1.) Where any ship has either wholly or as to any share therein become subject to forfeiture under this part of this Act (*a*) any commissioned officer on full pay in the military

or naval service of Her Majesty; (*b*) any officer of customs in Her Majesty's dominions; or (*c*) any British Consular officer, may seize and detain the ship, and bring her for adjudication before the High Court in England or Ireland, or before the Court of Session in Scotland, and elsewhere before any Colonial Court of Admiralty or Vice-Admiralty Court in Her Majesty's dominions, and the Court may thereupon adjudge the ship with her tackle, apparel and furniture to be forfeited to Her Majesty."

Merchant Shipping Act, 1906. Sect. 51: "(1.) Where it appears to the Commissioners of Customs that there is any doubt as to the title of any ship registered as a British ship to be so registered, they may direct the registrar of the port of registry of the ship to require evidence to be given to his satisfaction that the ship is entitled to be registered as a British ship.

"(2.) If within such time, not less than thirty days, as the Commissioners fix, satisfactory evidence of the title of the ship to be registered is not so given, the ship shall be subject to forfeiture under Part I. of the principal Act.

"(3.) In the application of this section to a port in a British possession, the Governor of the British possession, and, in the application of this section to foreign ports of registry, the Board of Trade, shall be substituted for the Commissioners of Customs."

The question of jurisdiction which has been raised is this: The jurisdiction to entertain and deal with the petitions before the Supreme Court, if it possesses that jurisdiction, depends upon s. 76 just cited. It is contended, however, for the present appellants that that section confers authority upon no Court excepting those within the dominions of the Crown, whereas the Court at Shanghai is not within British territory. That contention on the part of the appellants, in their Lordships' opinion, must prevail, for the language of the section is express, and there appears to their Lordships to be no other statutory authority extending the jurisdiction under this section to the Shanghai Court.

For the foregoing reasons their Lordships are of opinion that the appeal should prevail. They will humbly advise His

J. C. 1909 THE S.S. MAORI KING.

Majesty that the decree of April 23, 1908, should be set aside, and the respondent's petitions dismissed without costs.

There will be no order as to the costs of the appeal.

Solicitors for appellants: *Parker, Garrett, Holman & Howden.*
Solicitor for respondent: *Solicitor, Board of Trade.*

[PRIVY COUNCIL.]

J. C.* 1909 *July* 7, 30.

GEORGE TAYLOR FULFORD . . . . . APPELLANT;

AND

DOROTHY FULFORD HARDY AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Construction of Will—Testator's Children to take equal Shares in the Residue at Majority—Accumulations of Income during Minority of Donee.

The testator gave to each child an equal share of the income of the whole of his residuary estate subject to the provision "that until each child attains the age of twenty-five years what would have been his or her share is to accumulate and form part of my general estate":—

Held, that according to the true construction of this provision the accumulations of each share during conventional minority were intended to increase the general residuary estate of which each child was entitled to a share at twenty-five, and not for the exclusive benefit of the sharer.

APPEAL from a judgment of the Court of Appeal (April 21, 1908) affirming a judgment of Riddell J. (December 12, 1907).

The question decided was as to the construction of the four clauses of the will of George Taylor Fulford, who died on October 15, 1905. The will was dated February 12, 1902, and there were two codicils dated November 15, 1902, and October 13, 1905.

The testator gave each of his daughters an annuity of $12,000 until they should attain twenty-five years of age. The appellant was not born at the date of the will, but by par. 16 the testator made provision for the support, maintenance, and

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD COLLINS, and SIR ARTHUR WILSON.

education of another child or children if any should be born, as follows: "The sum of three thousand dollars each per annum to be paid to the mother or other guardian until the age of fourteen years is reached. From the age of fourteen years to twenty-one years five thousand dollars per annum. From the age of twenty-one to twenty-five years, in the case of a son twenty-five thousand dollars per annum, in the case of a daughter twelve thousand dollars per annum."

The respondent Dorothy, the testator's eldest daughter, in her suit after attaining twenty-five years of age for the construction of the will, claimed that she was entitled, particularly under clauses 18, 19, and 21, set out in their Lordships' judgment, to her proportionate share, that is, one-third of the total income of the estate including the income derived from the investment of so much of the remaining two-thirds of the income of the estate as was not required for payment of the specific annuities mentioned in the will, and that the accumulation of the shares of the children while under the age of twenty-five years fell into the general estate and was not to be accumulated for the benefit of those children respectively while under the age of twenty-five years.

The appellant claimed that the testator's intention was that the children should share equally in the income of his estate, and that the share of each child who during the ten-year period of accumulation mentioned in par. 19 does not attain twenty-five should be accumulated for his or her benefit, or at least that if such accumulation was for the benefit of the general estate it should not extend beyond the ten-year period. He was supported in that contention by the younger daughter Martha; while the other infant defendants, children of the appellant, agreed with the contention put forward by their mother.

Both Courts below decided in favour of the respondent's contention.

Hellmuth, K.C., and *Cattanach*, for the appellant.
Harold B. McGivern, for the respondent Martha.
Nesbitt, K.C., and *A. M. Stewart*, for the respondent Dorothy.
Buckmaster, K.C., and *F. W. Harcourt, K.C.*, for her children.

J. C.
1909
FULFORD
v.
HARDY.
1909
July 30.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The question arises in this case under the will of the late George Taylor Fulford.

The will, which is divided into paragraphs, provides in the earlier paragraphs for an annuity to his wife (par. 9), and annuities to his two daughters till they attain the age of twenty-five (par. 10). It then goes on to leave certain annuities and legacies to other persons, and, after making provision for the case of other children being born, proceeds (par. 17) to make special provision as to his house and grounds in the event of his leaving a son. No questions arise on these paragraphs, but then follow the paragraphs which give rise to the controversy.

Paragraph 18 provides: "I direct that as each child attains the age of twenty-five years his or her income from my estate is to be, during the ten-year period of accumulation hereinafter provided for, his or her proportionate part of ninety per cent. of the income of my estate after all charges are paid (excluding always, as hereinafter directed, the income of my business), it being my intention that my children are to share equally in such income, but until each child attains the age of twenty-five years, what would have been his or her share is to accumulate and form part of my general estate."

It will be observed at once that this paragraph is couched in what may be termed anticipatory language. Up to this time there has been no gift to a child of an "income from my estate," and the ten years period has not yet been mentioned. Accordingly the next paragraphs bring out the testator's meaning.

Paragraph 19 provides: "I direct that for the ten years after my death the surplus income of my estate, after paying the annuities and other charges and amounts to be paid, shall be allowed to accumulate, and at the expiration of such ten years ten per cent. of the total amount of my estate, exceeding two million five hundred thousand dollars, but not exceeding four hundred thousand dollars in all, shall be set apart and be paid out of my personal estate to the Brockville General Hospital for the purpose of establishing a Home for the Indigent Protestant old women who are bona fide residents of Canada and without adequate means of support. . . . ."

Paragraph 20 provides: "I direct that the revenues and income from my said business, whether in the form of a joint stock company or companies or otherwise, shall not be paid over as part of the income of my estate, but that the surplus income of said business, after making all proper allowances and provisions, shall be accumulated from year to year and invested and form part of the capital of my estate, from which the income to be paid over under this will is to be derived."

And paragraph 21 provides: "I give, devise, and bequeath all the rest, residue, and remainder of my property of every kind (including the amounts reserved to pay annuities as they cease to be required), to be disposed of as follows: Subject to the preceding provisions, including those as to accumulation and the times of being entitled to payment, the income each year is to be divided between my children equally, share and share alike; on the death of each child, his or her children shall be entitled in equal shares to the same proportion of the capital of my estate as he or she was entitled to of the income, and the same shall be paid over by my executors accordingly (the issue of any who may be dead leaving issue to take their parents' share), but should he or she die without issue the same share or proportion of capital shall belong to my estate."

The testator died in 1905, survived by his widow and three children—Dorothy, at that time twenty-four but now over twenty-five; Martha, at that time twenty-two but now over twenty-five; and George, then three, and still an infant.

The actual question for decision arises by Dorothy claiming, as from the date of her attaining the age of twenty-five, a third of 90 per cent. of the income of the total estate (other than the business income), and insisting that the total estate falls each year to be swelled by (1.) the third of income which, till she attained twenty-five, Martha could not receive, and (2.) the third which, up to the time of his attaining twenty-five, George cannot receive.

This is resisted on behalf of the infant, whose guardians contend, first, that the third falling to him, though not payable till he attains twenty-five, must nevertheless be accumulated for his benefit; and, secondly, that, however that may be at present, at any rate it is so after the ten years period has elapsed.

J. C. 1909 FULFORD v. HARDY.

Their Lordships do not think that there is any real doubt as to the meaning of the directions. The confusion, such as it is, only arises from what has already been noted, namely, that par. 18 deals by anticipation with what is actually given thereafter.

The ruling gift is undoubtedly to be found in par. 21, which gives each child an equal share of the income of the whole of the residue of the estate; i.e., the residue after payment of the annuities and legacies. But this gift is made expressly subject to the "preceding provisions, including those as to accumulation and the times of being entitled to payment."

Now, there is no mention of times of being entitled to payment except that contained in the 18th paragraph, from which it seems duly to follow that the expression "it being my intention that my children are to share equally in such income, but until each child attains the age of twenty-five years, what would have been his or her share is to accumulate and form part of my general estate," is a general expression applicable to the whole will, and not limited in its application to the ten years period. If this be so, the whole question is solved. But it may be as well to deal specially with two arguments which were pressed against this construction. It was said, first, that this was penalizing the son in favour of his sisters. To this the answer is that, if the language be plain, it must be given effect to, and cannot be made to bend to a supposed predilection in favour of male offspring; that, so far as the residue is concerned, it is clear no distinction is made in favour of son as against daughter; and, further, that the son is expressly given certain advantages in the matter of the house and an allowance for a yacht.

It was said, secondly, that this construction, if given effect to, would have the iniquitous effect, if the son married and then died before he attained twenty-five, leaving issue, of giving that issue a share of the capital only proportionate to the small annuity taken by the son during conventional minority. Their Lordships do not think any such result would happen. In their view the expression "same proportion of capital . . . . as he or she was entitled to of the income" refers back to the taking equally, share and share alike, in what has sometimes been called a "notional" sense, and is not referable to the amount of

income actually up to that time enjoyed. It has only been thought necessary to mention this, as some remarks of the trial judge might seem to give countenance to the opposite idea.

The scheme of the will seems simple. A mere annuity is given to each child during conventional minority. Each child, as it attains conventional majority, is to take an equal share of the income which is determined by division by the divisor representing the number of the children, the shares which would have fallen to the others not yet conventionally major being accumulated and going to swell the capital. The ten years' accumulation for the purpose of the hospital works out simply and side by side with this, as also does the accumulation scheme for the business income; and both of these can be given full effect to, except in so far as the latter in the future may be disturbed by the Thellusson Act, or any corresponding Act of Ontario.

Their Lordships are accordingly of opinion that the conclusion reached by the Court below was right in substance. Technically the order made is not quite accurate, because it affirms that not only now, but also in the future, Dorothy and Martha are entitled to one third each, whereas it is possible that by the death of one or other of them, or by the death of George, the proportion might alter.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed, and the judgment affirmed, with a variation giving liberty to the infant defendant, George Taylor Fulford, to apply to the Court on attaining twenty-five, and to any party interested under the testator's will to apply to the Court, for such modification of the judgment as may be proper in the event of the death of any one or more of the testator's children.

The costs of all parties will be paid out of the estate and will be taxed and disposed of by the Courts in Ontario.

Solicitors for appellant and the respondent Martha Shirreff: *Freshfields.*

Solicitors for the respondent Dorothy Hardy and her children: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1909 July 6, 7, 30.

SPRAGUE . . . . . PLAINTIFF;

AND

BOOTH . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Deposit by Purchaser to guarantee Fulfilment of Contract—Default by Purchaser or his Assignee—Action to recover Deposit dismissed.

Under a contract for sale of railway stock and also for transfer of bonds to be thereafter executed, a deposit of $250,000 was received by the respondent vendor as security for and to be credited towards the payment of the price on June 1, 1902, or to be forfeited on default. In an action by the assignee of the purchaser without tendering the price to recover back the deposit, as the bonds were not ready for delivery at due date:—

Held that, as the evidence shewed that the purchaser or his assignee was responsible for the non-production and non-completion thereof, there was default by him in payment of the price, and the action must be dismissed.

APPEAL from a judgment of the Court of Appeal (November 10, 1908) affirming a judgment of Mabee J. dismissing the appellant's action.

The action was for breach of a contract dated January 22, 1902, the terms of which are sufficiently set out in their Lordships' judgment, and for repayment by the respondent with interest of $250,000, a deposit thereunder. The appellant's case was that the respondent, the vendor, was in default, that his purchaser, Meyer, had always been ready and willing to carry out the contract, that if Meyer was at any time in default it was occasioned by the respondent's default, and that by reason thereof Meyer was exonerated, that his default, if any, had been waived, and was not of such a nature as to justify the retention of the deposit.

The respondent denied any default by himself and pleaded that one Webb, who at the due date of the contract was the

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD COLLINS, and SIR ARTHUR WILSON.

assignee of the purchaser's rights now vested in the appellant, was in default, and, being the only person at that time entitled to performance of the contract, acquiesced in the respondent's retention of the deposit, and could not by assignment vest in the appellant a better right than he had himself.

The trial judge found that there was no default by the respondent and that Webb's default was the cause of the non-fulfilment of the contract, and that his conduct shewed an intentional abandonment thereof, and the Court of Appeal affirmed this view.

Nesbitt, K.C., and *A. M. Stewart*, for the appellant, contended that the evidence shewed that the respondent refused to deliver the bonds and wrongfully declared the agreement at an end and the deposit forfeited. He thereby absolved the purchaser Meyer and his assignee Webb from the performance of the agreement so long as such refusal continued. Not being himself ready to complete, he could not plead default by his purchaser. Further, the forfeiture of the deposit was a penalty from which the Court would relieve. It was not one of liquidated damages, for the purchaser was exposed to it equally upon a refusal to perform, the slightest delay, or, in the absence of any delay, by reason of a deficiency in the smallest portion of the price. Reference was made to *Public Works Commissioner* v. *Hills* (1); *In re Dagenham (Thames) Dock Co., Ex parte Hulse* (2); *Cornwall* v. *Henson* (3); *Levy* v. *Stogdon* (4); *Howe* v. *Smith.* (5)

Shepley, K.C., and *J. Christie, K.C.*, for the respondent, contended that the evidence shewed that the respondent was not in default. He was shewn to have been in readiness, so far as anything to be done by him was concerned, to carry out the contract. The purchaser assumed in the contract or by consent after the contract the onus of preparing the bonds. They were part of the machinery devised by him to raise the purchase-money. Webb was responsible for their non-production, and the appellant stood in his position. There had been no real intention

(1) [1906] A. C. 368, 375.
(2) (1873) L. R. 8 Ch. 1022.
(3) [1900] 2 Ch. 298.
(4) [1898] 1 Ch. 478; [1899] 1 Ch. 5.
(5) (1884) 27 Ch. D. 89.

J. C. 1909 SPRAGUE v. BOOTH.

to carry out the purchase. The deposit money was forfeited by the default made. There was no waiver and no ground for the appellant asking to be relieved, since he had completely failed to perform his contract.

Nesbitt, K.C., in reply.

1909 *July* 30.

The judgment of their Lordships was delivered by

LORD DUNEDIN. In January, 1902, the respondent Booth, who was the owner of substantially all the stock of the Canada Atlantic Railway Company, entered into a contract with Arthur L. Meyer for the sale of the same. By the terms of the contract Booth became bound on receipt of the purchase price of $10,000,000, on June 1, 1902, to transfer to Meyer the whole of the stock standing in his name. The contract further recited that, it being the intention of the company as a company to issue two sets of bonds for $1,000,000 and $10,000,000 respectively, secured by mortgages over different parts of the railway in favour of Booth, who was a large creditor of the company, Booth should, at the same time as he transferred the stock, also transfer the said bonds to Meyer, with the exception of bonds for $1,608,000, which were to be appropriated for payment and extinction of already existing bonds. Meyer became bound to pay for the expenses connected with the issuing of the said bonds. There was also a provision under which Booth might call upon Meyer for a temporary loan.

By subsequent agreement contained in correspondence in March, 1902, Booth gave up the right to ask for a loan, and in lieu thereof consented to receive a deposit of $250,000 "as security for the due carrying out of the terms of the said agreement by you, and in the event of any default being made in the payment of the money under the terms of the said agreement on the 1st June, 1902, or sooner, the said sum of $250,000 shall thereupon be forfeited and remain my absolute property as liquidated damages for such default."

In the event of the payment of the price, the said sum was to be credited as part payment.

On March 15, 1902, the said sum of $250,000 was paid by Meyer to Booth.

On April 28, 1902, Meyer assigned all his rights under the said contract and agreement to Seward Webb, and the said assignment was intimated to Booth.

Booth thereafter prepared to fulfil his part of the contract. He procured the mortgages to be executed by the railway company, and he was ready to get the president and secretary of the company to sign the bonds. Before, however, this was done, the signing of the bonds was stopped by Webb, who got back the printed bonds with a view to changing the form thereof. This happened on April 18, 1902. Soon after this, Webb got disgusted with the whole transaction as it stood, and intimated that he did not intend to carry it out as it stood, but that he would submit a new proposition. Eventually, on May 29, he intimated that he had now no further proposition to make, but that he surrendered all his rights back again to Meyer. Meyer now came to be represented by a Mr. Regensburger. This gentleman, knowing that the bonds had not been executed, they never having been handed back by Webb to Booth, proceeded to Ottawa on June 2, having sent a formal letter calling on Booth to deliver the bonds, and, having arrived there, took up the position that he did not need to produce the money as the bonds were not ready. Booth upon this wrote a letter on June 3, holding that default had taken place, and intimating that he held himself free and entitled to keep the $250,000. Nothing more happened, and the railway was eventually sold to another purchaser.

On November 17, 1905, Meyer assigned to Sprague, the plaintiff and appellant, all his rights under the contract, and upon this assignment Sprague now sues Booth for (1.) the return of the $250,000 and (2.) damages for breach of contract.

The claim for damages was felt by the learned counsel who appeared for the appellant to be too hopeless to be seriously pressed. They, however, insisted on the claim for repayment of the $250,000, upon the ground that there having been, as they alleged, default on both sides, the deposit had not been rightly forfeited, and could therefore be recovered as money had and received.

The nature and incidents of such a deposit are accurately

J. C. 1909 SPRAGUE v. BOOTH.

discussed in the case of *Howe* v. *Smith*. (1) Indeed in this case the document under which the deposit was made leaves nothing to be supplied, as it in terms provides for every event. If payment is made of the purchase-money, it is to be credited to such payment; if default is made in the payment of the money, then the deposit is forfeited. The sole question therefore comes to be, was default made in the payment of the purchase-money on June 1, 1902? Now the plaintiff does not pretend that the money was paid on June 1, or was ever paid at all, or offered to be paid. What he says is that, the bonds not being ready to be delivered, to his knowledge, he was absolved from tendering the money on June 1, and that therefore he was not in default.

There having been a formal assignment by Meyer to Webb, and no formal retrocession, it is perhaps doubtful whether Booth was bound to recognize Regensburger as acting for Meyer on June 1 at all. But assuming that he was, it is clear that Meyer could have no higher rights than his assignor, Webb. Could Webb, then, have taken up the position taken up by Meyer? It is true the bonds were not ready, but the whole fault of the delay lay at Webb's door. By arrangement between the parties the prints of the bonds had been committed to Webb. Webb therefore could not have been heard to say that it was the fault of Booth that the bonds were not ready; and no more could Meyer, to whom, or his agents, the bonds had subsequently been handed by Webb.

It was said by Lord Blackburn in the case of *Mackay* v. *Dick & Stevenson* (2) that "Where, in a written contract, it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing."

When therefore the parties have agreed that the furnishing of the corpus of the bonds should be entrusted to Webb, and when Webb failed to produce the bonds in time to be signed by June 1, it seems to their Lordships that it stopped the mouth of Webb or his assignee from saying that Booth was in default in not

(1) 27 Ch. D. 89. (2) (1881) 6 App. Cas. 251, at p. 263.

having signed the bonds. It therefore follows that the non-payment of the money was not excused by any default of Booth, and was therefore default on the part of Webb or his assignee. This result seems to follow equally whether time was or was not of the essence of the contract. If it was, the result must follow. If it was not, it might still be that, by offering the money, Webb or his assignee might have been entitled to be given specific performance on terms as to the actual date of payment and delivery of the bonds. But to consider themselves absolved by the mere non-production of the bonds, the completion of which they themselves had by their conduct prevented, and then—without even proposing to offer the money—to treat this as a basis for repetition of the deposit and a claim of damages for non-performance, was, in the opinion of their Lordships, out of the question.

Their Lordships are therefore of opinion that the Courts below took a right view of the true circumstances of the case, and will humbly advise His Majesty to affirm the decision appealed against.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondent: *Bischoff & Co.*

[PRIVY COUNCIL.]

J. C.* 1909 *May* 4, 6; *July* 22.

ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND AT THE RELATION OF JAMES THOMAS ISLES . . . . . } PLAINTIFF;

AND

COUNCIL OF THE CITY OF BRISBANE . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Queensland Local Authorities Act of 1902, *ss.* 192 *and* 265—*Construction—General Rates—Application of General Rates levied in one Division to Construction of Works in another.*

Held, that according to the true construction of ss. 192 and 265 of the Queensland Local Authorities Act of 1902 the respondents (the council of the city of Brisbane being its duly constituted local authority) are not entitled to expend the produce of general rates levied upon the rateable lands in one division of their area upon works constructed in another, in the absence of a resolution under s. 265 declaring in the mode provided by that section that such works are general works and that their cost shall be defrayed out of general revenue.

The appellant sued, as representing an association of ratepayers, for a declaration that in the absence of such resolution the balance of all general rates received in the several divisions, after deduction of all items chargeable to general revenue, shall be expended solely upon works within the respective limits thereof; the respondents claimed that they were authorized in their discretion to apply the whole of the general rates received by them upon any works within any division without regard to the actual amount of the general rates received by them in respect of any of the divisions:—

Held, that both contentions must be overruled. The effect of the sections is in the absence of such resolution to limit the power of expenditure upon works in a division to the amount of general rates received in it, but not to preclude the application of any unexpended balance thereof to the general purposes of the whole area.

APPEAL from a judgment of the High Court (March 23, 1908) reversing by a majority a judgment of the Chief Justice of Queensland (December 13, 1906).

The main question in the appeal was as to the extent and limits of the respondents' powers with reference to moneys

* *Present:* LORD LOREBURN L.C., LORD ASHBOURNE, LORD JAMES OF HEREFORD, LORD GORELL, and LORD SHAW.

received by them on and after April 20, 1906 (the date on which the writ was issued), in respect of general rates levied upon rateable lands in the seven divisions of its area.

The appellant's case was that notwithstanding the provisions of s. 265 of the Queensland Local Authorities Act of 1902 the respondents had from time to time expended and claimed the right in future to expend, without passing any such resolution as is mentioned therein, moneys received by them in respect of general rates levied upon the rateable lands in one or more of the divisions of their area upon the construction and maintenance of works in another or others of such divisions.

By his writ he claimed (1.) a declaration that all moneys received in respect of general rates levied upon the rateable lands in the several divisions or wards of the defendants' area, and all moneys received by way of endowment upon such rates, after all just deductions for expenditure in respect of salaries, allowances, and the management of the defendants' office, and for such other expenditure as the defendants may by resolution from time to time properly direct to be paid out of general revenues, shall be expended solely upon works within the respective limits of the several divisions or wards in respect of the rateable lands of which such general rates shall have been received, and (2.) an injunction restraining the defendants from expending or directing or permitting to be expended any general rates received in respect of the rateable lands in the several divisions or wards of their area otherwise than in accordance with the terms of the declaration hereinbefore claimed.

The principal contention of the respondents was contained in paragraph 6 of their statement of defence and was as follows:

"6. The defendants contend that they are authorized and empowered by law as and when in their judgment and discretion they deem it to be necessary to expend the moneys received by them from time to time in respect of general rates upon any works within any division or ward of their area without regard to the actual amount of the said general rates which has been received by them in respect of any of the said divisions or wards, and the defendants have from time to time duly expended the said moneys accordingly."

J. C.
1909
ATTORNEY-GENERAL FOR QUEENSLAND
v.
BRISBANE CITY COUNCIL.

The Chief Justice of Queensland decided in effect that the operation of s. 265 was to curtail the power of a local authority whose area is divided with respect to the expenditure of general rates contributed by the separate divisions, and that by reason of that section, taken in conjunction with other sections of the Act, the general rates raised in any one division of the area were not (in the absence of a proper resolution) applicable towards expenditure on works in any other division of the area.

The High Court (Griffiths C.J., Barton, O'Connor, and Higgins JJ.) were of opinion that s. 265 was not intended to control real expenditure, but was a mere book-keeping or record section providing for the keeping of records of ward receipts and expenditure, and that that section did not operate to cut down the absolute discretion given by s. 192 of the Act to the local authority as to expenditure of the local fund of which all general rates formed a part.

Isaacs J. dissented and held with the Chief Justice of Queensland that s. 265 was a section dealing with actual receipts and disbursements, and not merely a record of ward and division receipts and expenditure, and consequently that the separate accounts mentioned in s. 265 were within the exception contained in s. 192 whereby the general power of expenditure conferred by that section on the local authority was limited. He decided, however, that the declaration and injunction granted by the Chief Justice of Queensland were too wide, and that in his opinion the judgment should be limited to a declaration that the respondents are not entitled to expend and an injunction restraining them from expending general rates raised in any division upon works constructed in another division in the absence of a resolution and direction prescribed by s. 265.

P. Ogden Lawrence, K.C., and *W. C. Ryde*, for the appellant, contended that the judgment of the High Court was erroneous and ought to be reversed, and that the judgment of the Chief Justice of Queensland should be restored; alternatively, that the judgment of Isaacs J. should be approved. The appellant was entitled to a declaration that the respondents are not entitled to spend general rates raised in one division of their area upon

works constructed in another, in the absence of a resolution as required by s. 265. On the true construction of that section, when an area is divided, the local authority is not entitled in the absence of such resolution to expend upon works within the limits of a division the general rates levied upon the rateable lands in any other division. Sect. 265 does not merely prescribe a formal method of book-keeping, but contains operative provisions relating to general works expenditure and the right and mode of appeal from a decision of the local authority.

Sir R. Finlay, K.C., and *E. Charles*, for the respondents, contended that the judgment of the High Court should be affirmed. Sects. 191 and 192 of the Act of 1902 provide that all moneys received by the local authority from general rates shall be carried to the credit of the city fund. That fund " shall be applied " towards the cost of carrying that Act or any other Act into execution, unless in the case of expenses expressly charged by that or some other Act to any specified fund or account. In the absence of such express direction the local fund and the general rates included therein were at their discretion in carrying out any authorized works. It was not intended that s. 265 should cut down the powers given by the earlier sections. It is a book-keeping section and directs the keeping of accounts for each division. On the credit side were to be entered the amount of general rates received therein and the endowments received in respect thereof. On the debit side all moneys expended on works within the division were to be entered, except those which come within the first proviso of the section. The respondents have acted throughout in strict observance of the terms of the Act of 1902.

P. Ogden Lawrence, K.C., in reply.

1909
July 22.

The judgment of their Lordships was delivered by

Lord Gorell. The questions which are raised upon this appeal are of very considerable importance and difficulty. They depend upon the construction of certain sections of the Local Authorities Act of 1902 for Queensland, which is an Act for the consolidation of the laws in force relating to municipalities (boroughs and shires) and divisions.

J. C.
1909
ATTORNEY-GENERAL FOR QUEENSLAND v. BRISBANE CITY COUNCIL.

The Act is of general application in the Colony, but the present dispute arises in the city of Brisbane, for which the respondents are the duly constituted local authority. The area of the city is divided, under the provisions of the Act, into seven wards, and the relator, James Thomas Isles, is a ratepayer in one of them, namely, the west ward, and represents the ratepayers who are members of an association of ratepayers of the east and west wards of the city.

The appellant states in his case on appeal that the question arising in the appeal is whether the respondents are entitled to expend any portion of the general rates levied by them in one of the wards of the city upon the construction and maintenance of works in another or others of the wards of the city without having first duly passed (at a meeting specially summoned for that purpose) a resolution (1.) declaring such works to be of such importance to the whole of the city that the cost of construction and maintenance may reasonably be a charge upon the whole of the respondents' general revenue, and (2.) directing that the cost of construction and maintenance of such works shall be defrayed out of the respondents' general revenue.

The appellant commenced an action in the Supreme Court of Queensland on April 20, 1906, against the respondents to obtain a decision upon the points in dispute between them, but in his statement of claim he seems to have made a claim of a wider character than that involved in the question as above stated, for he claimed a declaration that all moneys received in respect of general rates levied upon the rateable lands in the several divisions or wards of the defendants' area and all moneys received by way of endowment upon such rates, after all just deductions for expenditure in respect of salaries, allowances, and the management of the defendants' office, and for such other expenditure as the defendants may by resolution from time to time properly direct to be paid out of general revenues, shall be expended solely upon works within the respective limits of the several divisions or wards in respect of the rateable lands of which such general rates shall have been received. There was also a claim for an injunction and an account. The substantial contention of the respondents in answer to this claim was

(paragraph 6 of the statement of defence) that they were authorized by law, as and when in their discretion they deemed necessary, to expend the moneys received by them from time to time in respect of general rates upon any works within any division or ward of their area without regard to the actual amount of the general rates which were received by them in respect of any of the divisions or wards, and that they had from time to time duly expended the said moneys accordingly. Although the respondents do not appear to have in fact expended out of the general rates on works within any division more than the amount raised by general rates in that division, their contention as above stated was maintained through the Courts below.

The case was heard before the Chief Justice of Queensland, and on December 13, 1906, he gave judgment in favour of the appellant, and made a declaration in the terms asked for by the appellant in respect of moneys received since April 20, 1906, with an order upon the respondents to keep accounts for each division of their area in accordance with the provisions of the said Act, and he granted an injunction to enforce the declaration, and gave the appellant the costs of the action.

From this judgment the respondents appealed to the High Court of Australia. The appeal was argued first at Brisbane, and afterwards re-argued at Melbourne, before the Chief Justice of the High Court and Barton, O'Connor, Isaacs, and Higgins JJ., and on March 23, 1908, the Court set aside the said judgment and entered judgment for the respondents with costs. Isaacs J. dissented, but was of opinion that the declaration aforesaid was too wide, and that a modified declaration should be made to the effect that the respondents were not entitled to spend general rates raised in any division upon works constructed in another division in the absence of the resolution and direction prescribed by s. 265 of the said Act, and that there should be an injunction accordingly.

In order to understand and appreciate the controversy it is necessary to examine the legislation relating to the subject which has taken place during recent times in Queensland.

In 1878 was passed the Local Government Act of that year, which provided for the constitution of municipalities, including

J. C.
1909
ATTORNEY-GENERAL FOR QUEENSLAND v. BRISBANE CITY COUNCIL.

Brisbane, with powers to the Governor in Council to sub-divide a municipality into divisions, and contained full provisions for the government, &c., thereof. Sect. 145 dealt with the keeping of proper books of account shewing receipts and payments. Sect. 175 stated of what the ordinary revenue of the body corporate should consist and dealt with the application thereof.

Its terms were as follows:

"The ordinary revenue of every municipality shall consist of the moneys following (that is to say)—

"Rates (not being special or separate rates), tolls, and rents of tolls;

"Moneys received by the council under any grant or appropriation by Act of the Parliament of Queensland not containing any provision to the contrary;

"All other moneys which the council may receive under or in pursuance of this Act not being the proceeds of any loan.

"And all such moneys shall be carried to the account of a fund to be called the 'municipal fund,' and such fund shall be applied by the council towards the payment of all expenses necessarily incurred in carrying this Act into execution and of doing and performing all acts and things which the said council are or shall be by this or any other Act empowered or required to do or perform."

The important matter to notice in this section is that it does not contain at the end any proviso or exception such as that which is to be found in the 192nd section of the Act of 1902 hereinafter set forth.

Sect. 187 provided that the council might make and levy general rates equally on all the rateable property in the municipal district, and by s. 188 they had power to make and levy separate rates equally on all rateable property situated within any particular portion of a municipal district for the purpose of defraying the expenses in doing or executing any work, improvement, or undertaking which they were authorized to do or execute for the special benefit of such portion of the district. According to s. 189, they were to keep a separate account of separate and special rates, and apply the moneys in respect of such rates for the several purposes for which they were authorized to make and levy such rates and not otherwise.

In 1887 the Divisional Boards Act of that year was passed for consolidating and amending the laws relating to local government outside the boundaries of municipalities with somewhat similar and other provisions. Sects. 189, 191, 192, 195, 196, and 197 may be referred to.

In 1890 the Valuation and Rating Act of that year was passed. It did not repeal s. 175 of the Act of 1878, nor s. 189 of the Act of 1887, but repealed inter alia ss. 187, 188, and 189 of the former and ss. 191 to 221 of the latter Act. The relative sections are 27 to 42, which refer to two kinds of rates, general and special. General rates were to be equally levied, but, where a district was sub-divided, need not be the same in each division, and s. 34 provided that when the amounts of the general rates levied upon its rateable land in the several sub-divisions of a district were not the same, separate and distinct accounts were to be kept of all moneys received in respect of such rates for each sub-division, but made no provision for the disposal of the moneys so as to affect the general powers conferred by s. 175 of the Act of 1878 and s. 189 of the Act of 1887. Power was given by s. 38 to make separate rates for works for local benefit, and under s. 42 accounts of separate and special rates were to be kept and the moneys applied for the purposes for which the rates were levied and no other.

Then came the Local Authorities Act of 1902, under which the questions arise. It repealed the former Acts, but continued the division of Brisbane into five wards with power to the Governor in Council to alter their number, under which power they have been altered to seven. A separate list of ratepayers was to be made for each division (s. 26), general powers of control and of construction and maintenance of necessary public works, &c., were given (ss. 60, 62, and 71), and in ss. 191 and 192 will be found the provision about revenue upon which so much turns in this case. These sections are as follows:

Sect. 191. "The ordinary revenue of an area shall consist of the moneys following, that is to say—

"Rates (not being special rates or tramway rates), ferry dues, market charges, and other dues, fees, and charges authorized by this Act, and rents;

J. C. 1909

ATTORNEY-GENERAL FOR QUEENSLAND v. BRISBANE CITY COUNCIL.

"Moneys received by the council under any grant or appropriation by any Act not containing any provision to the contrary, or in pursuance of any Act requiring moneys received by a local authority to be paid into the local fund;

"All other moneys which the council may receive under or in pursuance of this Act not being the proceeds of a loan."

Sect. 192. "(1.) All such moneys shall be carried to the account of a fund to be called, in the case of a town the 'town fund,' in the case of a city the 'city fund,' and in the case of a shire the 'shire fund.'

"(2.) The local fund shall be applied by the local authority towards the payment of all expenses necessarily incurred in carrying this Act into execution, and in doing and performing any acts and things which the local authority is by this or any other Act empowered or required to do or perform, unless this or such Act contains express provision charging such expenses to any particular fund or account.

"(3.) The local authority may pay out of the local fund any sum due under an agreement lawfully made for the purposes of this or any other Act, and any sum recovered against the local authority by process of law, and any sum which by any order made or purporting to be made under this or any other Act the local authority is directed to pay by way of compensation, damages, costs, fines, penalties, or otherwise, unless this or such other Act contains express provision charging such sums to any particular fund or account."

Sect. 209 gives the local authority power to make two kinds of rates, general and special. Subject to the provisions in the Act contained relating to divided areas, general rates are to be levied equally upon all rateable land in the area. No general rate made in any one year shall exceed the amount of threepence in the pound of the value of the rateable land upon which it is made.

When an area is divided, the amounts of the general rates levied upon the rateable land in the several divisions need not be the same (s. 210, sub-s. 3). If the local authority at the beginning of any year has to the credit of the local fund sufficient money to defray its probable and reasonable expenses for that

year, the Governor in Council may excuse the authority from making a general rate during the year in respect of the whole area or any division thereof (s. 210, sub-s. 4). Sect. 213 gives power to make special rates for purposes therein mentioned, and s. 214 gives power to make special rates (called a separate rate) upon any part of an area for works for its special benefit, and there are further provisions as to special rates. Sect. 215 provides that a special rate may be a separate rate, or may be made and levied equally upon all rateable land in the area. Sect. 251 requires proper books of account to be kept of all moneys received and paid and of the purposes for which they are received and paid. Sect. 261 directs separate and distinct accounts to be kept of separate and special rates, and "of all moneys disbursed in respect of the purposes for which such rates are levied, including in such disbursements such reasonable part of the expenditure in respect of salaries, allowances, and management of the office as the local authority may direct," and further directs the authority to apply the moneys standing to the credit of such account for the purposes for which such rates are levied and no other.

There are further provisions with respect to separate accounts for gasworks and waterworks, and the application of the moneys raised and received therefor, and with respect to loans and the application of money borrowed, and then comes the following section, which is of so much importance in the present case :—

Sect. 265. "When an area is divided the local authority shall in all cases keep a separate and distinct account of all moneys received in respect of general rates levied upon the rateable land in the several divisions, and of any moneys received by the local authority by way of endowment upon such rates respectively, so that the moneys so received shall be credited to the same accounts as the rates in respect of which they were respectively received.

"And save as hereinafter provided, all moneys expended upon works within the limits of a division shall be debited to the account of that division :

"Provided that when a work is of such importance to the whole

J. C. 1909 — ATTORNEY-GENERAL FOR QUEENSLAND v. BRISBANE CITY COUNCIL.

of the area that the cost of its construction and maintenance may reasonably be a charge upon the general revenue of the local authority, the local authority may from time to time, by resolution passed at a meeting specially summoned for the purpose, declare such work to be a 'general work,' and direct that the cost of its construction and maintenance shall be defrayed out of the general revenues, and shall not be debited to the separate account of any division, and such expenditure shall be so defrayed accordingly:

"Provided also that unless the local authority has directed that any part of the expenditure in respect of salaries, allowances, or management of the office should be debited to any separate account as hereinbefore provided, the expenditure in respect of all salaries and allowances and the management of the office of the local authority, together with any other expenditure as to which the local authority may from time to time by resolution so direct, shall be paid out of the general revenues, and shall not be debited to the separate account of any division.

"Any twenty ratepayers of an area may, by petition to the Minister, appeal against a resolution of the local authority under this section, and the Minister shall thereupon cause such inquiry to be made as he thinks necessary, and shall either confirm such resolution with or without amendment, or disallow the resolution, and his decision shall be final and binding. But the Minister may reconsider such decision at any time upon the petition of the local authority or any twenty ratepayers of the area."

It is to be noticed that s. 192, sub-s. 2, contains at its end an exception, or proviso, limiting the power of the authority with regard to the application of the local fund, of which the general rates form part, and this limitation, together with s. 265, gives rise to the difficulty in the case.

Before passing to a consideration of the more important sections, it may be worth while, as bearing on the practical powers which exist for making each area bear the burden of works for its special benefit, to point out that there is a maximum to the amount of the general rate, and (s. 223) to the special rates, not being separate rates, special water rates, special loan rates, cleansing rates, or tramway rates, that the general rate may

differ in different divisions, and that there may be separate rates for works of local benefit.

Now the contention of the appellant appears to be that the effect of ss. 192 and 265 is to require that all moneys expended upon works within the limits of a division shall be paid out of the general rates collected in the division, unless there has been a resolution declaring those works "general works"; and further, as their Lordships understand, that what is duly declared to be general expenditure shall be apportioned among the several divisions, and that any difference between the cost of the works in a division, together with its proportion of the general expenditure and the general rates received in the division, shall be applied solely for works in the division and retained for that purpose. In effect, the appellant wishes to treat each ward as an entirely separate financial unit.

The respondents' contention in answer to this is that s. 265 is merely an accountancy section for the purpose of providing information on which differential rating might be based, and does not contain any express provision as to the application of general rates, so that there is nothing to limit their general power to apply the moneys received from general rates as they think fit for any of the purposes of the Acts which they have to carry out and perform, and that they are in no way prevented from continuing the system which they have hitherto adopted.

After a very careful consideration of the sections of the Act, which appears to have been very loosely drawn in certain respects, and, indeed, drawn in such a manner as to lead to perplexing difficulties of construction, which might have been avoided by clear expressions of what was intended in such important matters as were being dealt with by the Act, their Lordships consider that a proper and reasonable construction of the sections shews that neither party is entirely in the right in their views.

It seems from a comparison of the previous Acts and the Act in question that an effort was being made to place more burden on a locality where works were done for its special benefit than on divisions to which the works were of no benefit, and although there were powers of differential rating and of making special

J. C. 1909 — ATTORNEY-GENERAL FOR QUEENSLAND v. BRISBANE CITY COUNCIL.

rates on a division in respect of works done for its special benefit, the sections in question seem to have contemplated that this effort might be to some extent responded to in dealing with general rates; but, even if the moneys expended upon works in a division are to be paid out of the general rates received in that division, still, so long as the former amount is less than the latter, no practical result is attained, unless something is to be found in the Act which prohibits the difference from being used for general purposes. As a matter of fact, in no case in the accounts before their Lordships have the moneys expended for works in a ward exceeded the amount of general rates received in that ward.

Now it seems clear from s. 192, sub-s. 2, that the local fund, which includes general rates, not only may be applied but "shall be applied" towards the payment of all expenses necessarily incurred in carrying the Act into execution, and the doing and performing any acts and things which the local authority is by the Act or any other Act empowered or required to do or perform, unless there is an express provision charging such expenses to any particular fund or account.

As this section is dealing with the actual application of money, and not with the method of keeping accounts, it is obvious that the proviso is intended to place some limitation upon the mode of application of the money, and that the words "charging such expenses to any particular fund or account" are equivalent to a direction that the particular fund or account is to bear such expenses as the express direction deals with. Then s. 265, while it directs that, save as thereinafter provided, all moneys expended upon works within the limits of a division shall be debited (that must mean the same as charged) to the account of that division, requires all the general rates levied in a division to be credited to an account for the division; but the effect of this is to place a limit upon the amount which can be applied to works in that division, because by s. 192 the authority is only able to apply its local fund (which includes such rates) for purposes the expenses of which have not been charged to a particular fund or account.

The limit of amount, then, by virtue of the two sections which

can be expended in a division on works in it is the amount of general rates received in it (apart, of course, from any separate rate under s. 214).

If, however, a resolution were passed declaring the works "general works," such works would be defrayed out of general revenue, and not be debited to the separate account of the division, and the limit would not operate on those works.

But suppose that the cost of works in a division does not amount to the sum received for general rates in the division, there is nothing in the sections which says that the difference is to remain, so to speak, the property of the division, and that it cannot be applied without any resolution to the general expenses of the area. The proviso in s. 192 only appears to cut down the general powers to the extent of the expenses which are charged to the particular fund or account, that is to say, to the cost of the works in the division to which the account relates.

So, again, the second proviso in s. 265, the first part of which appears to refer to the power to bring part of the expenditure for salaries, &c., into the separate account mentioned in s. 261, sub-s. 2, is not of any practical effect material to this case, for there is, except this reference, no express provision charging the expenses mentioned in it to any particular fund or account other than the general revenues.

Their Lordships consider that, on the one hand, to treat s. 265 as a mere accountancy section would be to give no real effect to it, but, on the other hand, the effect to be given to it as related to s. 192 is to place a limit upon the power of expenditure out of ordinary revenue on works in a division, such limit being the amount of general rates received in it, but not to affect the right of the respondents to apply the general rates received in any division so far as they exceed the cost of the works in such division to any of the general purposes of their area.

These considerations leave the position of the parties for all practical purposes unaffected so long as the respondents do not without a proper resolution and direction spend (except, of course, out of special separate rates, with which the case is not concerned) more money on works in a division than the amount of general rates received therein. If they were to exceed this amount, then,

J. C.
1909
ATTORNEY-GENERAL FOR QUEENSLAND v. BRISBANE CITY COUNCIL.

unless there be a resolution and direction in accordance with the first proviso in s. 265, they would be exceeding their powers. But it seems reasonably clear that, so long as less is spent on works in a division than the amount of general rates received in the division, no other division can be said to be called upon to pay out of the general rates of such other division for such works. At the same time, if the general rates are equally levied, and if the works in such other division are of small amount, so that their cost bears a less proportion to the general rates in it than the cost of works in the first-mentioned division bears to the general rates in it, the ratepayers in the other division will be contributing a larger proportion of their general rates to general expenses than those in the first-mentioned division. This, however, does not appear to be dealt with by the Act, except so far as there are powers to make different rates in different divisions and to make special separate rates in divisions.

It seems desirable that disputes between the ratepayers of a divided area and the council thereof, such as those which have given rise to this case, should be put an end to by the Legislature, and that the rights and liabilities of the respective ratepayers should be more clearly and distinctly defined than they are under the Act of 1902. At present, however, the appellant does not, in the opinion of their Lordships, appear to be entitled to the declaration as claimed, but only to a modified declaration as suggested by Isaacs J. to meet the extreme contention made in the sixth paragraph of the statement of defence. It may be noticed that the Chief Justice of the High Court was, on the first argument of the case before that Court, disposed to assent to the making of such a declaration, though his final conclusion was not in favour of doing so.

Their Lordships, after much consideration, are of opinion that the judgment of the High Court and the judgment of the Supreme Court of Queensland should be discharged, and in lieu thereof that it should be declared and ordered that the respondents are not entitled to expend moneys received by them in respect of general rates levied upon the rateable lands in one division or ward of their area upon works constructed in another division or ward of their area in the absence of the resolution and direction

J. C.
1909
ATTORNEY-GENERAL FOR QUEENSLAND v. BRISBANE CITY COUNCIL.

prescribed by s. 265 of the Local Authorities Act of 1902, and that an injunction should be granted restraining them from so expending general rates, and that each party should bear their own costs of the action both in the said High Court and in the said Supreme Court.

Their Lordships will humbly advise His Majesty accordingly. There will be no costs of this appeal.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Biddle, Thorne, Welsford & Sidgwick.*

[PRIVY COUNCIL.]

J. C.*
1909
May 3; *July* 23.

BOW, McLACHLAN & CO., LIMITED . . PLAINTIFFS;

AND

THE SHIP "CAMOSUN" AND THE UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA, LIMITED . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Exchequer Court of Canada (Admiralty)—Extent of Jurisdiction—Suit to enforce Mortgage of a Ship—Admiralty Court Act, 1861 (*Imperial*), *s.* 11 —*Plea of Set-off—Damages for Breach of Building Contract.*

The Exchequer Court of Canada was constituted by the Exchequer Court Act (50 & 51 Vict. c. 16) (Dominion) for the purpose of dealing with matters in which the Crown was concerned (ss. 15 and 16) and has no general common law jurisdiction. It has also under the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27) (Imperial), and the Admiralty Act, 1891 (54 & 55 Vict. c. 29) (Dominion), jurisdiction in Admiralty, including its statutory extensions.

In an action in rem by the appellants in the said Court, British Columbia Admiralty District, to enforce payment of the balance due on the mortgage of a ship, granted in respect of the price of construction, which it was agreed should be treated as money lent, the respondents, the registered transferees of the ship, pleaded by way of equitable

* *Present:* LORD LOREBURN L.C., LORD ASHBOURNE, LORD JAMES OF HEREFORD, LORD GORELL, and LORD SHAW.

J. C.
1909
BOW, MCLACHLAN & CO. v. SHIP "CAMOSUN."

defence that they were entitled to set off a sum of money expended by them, which was sufficient to prevent their being in default under the mortgage at the date of the action. It appeared that the set-off was claimed as a defence pro tanto so far as it was for a diminution in value of the ship by reason of its having been built negligently and defectively and not in accordance with contract:—

Held, that under the Admiralty jurisdiction as it formerly existed neither appellants nor respondents could have enforced their claims in an Admiralty Court. But s. 11 of the Admiralty Court Act, 1861, extends that jurisdiction so as to include the claim of the appellants, which was in respect of a mortgage duly registered under the Merchant Shipping Act; while the respondents' defence, though pleaded by way of set-off, in reality involved a cross-claim for unliquidated damages under a contract distinct from the mortgage sued upon, which the Court had no jurisdiction to entertain whether the claim was against the ship or the plaintiffs.

APPEAL from a judgment of the Supreme Court of Canada (June 16, 1908) affirming a judgment of the Exchequer Court of Canada (January 7, 1908), which affirmed a judgment of Martin J., the local judge in Admiralty for British Columbia (September 25, 1907), who overruled the plaintiffs' demurrer or objections in law to a plea in defence. The question decided in this appeal is whether in an action in rem brought in the Exchequer Court of Canada in Admiralty to enforce a registered mortgage of a British ship the owners of the ship can by way of defence set off a claim for unliquidated damages against the mortgagee for alleged breach of contract relating to the building of the ship.

The facts of the case and the course of the litigation are set out in their Lordships' judgment. In paragraph 7 of the amended defence the respondents alleged that the appellants did not build the mortgaged ship in accordance with the terms of the contract plans and specifications relating thereto, but, on the contrary, the said ship was built by the appellants negligently and with defective work and materials and not in accordance with the requirements of Lloyd's 100 A1 class and the Board of Trade, nor in accordance with the plans and specifications of the same, with the result that the respondents were forced to expend in repairing and replacing defective materials and bad workmanship and in making the said ship comply with the requirements of Lloyd's 100 A1 class and the Board of Trade, and in repairing and

renewing fittings, decorations, furniture, and stores damaged through leaking decks and hull and other defective materials and workmanship, and other incidental expenses, the sum of 3638*l.*, and they claimed that they were entitled to set off and deduct from any money which might be payable by them to the appellants the said sum of 3638*l.* so expended by them with interest and costs.

In the Supreme Court Fitzpatrick C.J. dissented from the judgment of the majority, but without stating any reasons. Davies J., "though entertaining many doubts," held that the appeal should be dismissed, but, in view of the particulars given by the respondents of the set-off, he desired to emphasize the limitation of their right, if the plea in paragraph 7 was established, to a deduction of the difference in value at the time of the delivery between the ship as she was and as she ought to have been according to the contract, but not of any special or consequential damages or any damages on account of any subsequent necessity for more extensive repairs. Idington J., after referring to the same limitation on the amount which could be set off, held that by virtue of s. 11 of the Admiralty Court Act, 1861, conferring on the High Court of Admiralty in England Admiralty jurisdiction "over any claim in respect of any duly registered mortgage," and s. 24, sub-s. 2, of the Judicature Act, 1873, as to the concurrent administration of the rules of law and equity in every civil cause commenced in the High Court, the Exchequer Court of Canada had on its Admiralty side power to give effect to any equitable defence. He considered that the set-off pleaded in paragraph 7 was an equitable defence, because if the vessel was not constructed in accordance with the building contract there was a failure of part of the consideration for which the mortgage was given, and the Court would in these circumstances have power to reduce accordingly the amount recoverable under the mortgage. Duff J. also concurred, subject, however, to the observation that the right of the respondents to obtain any abatement of the price might depend on whether any such right was allowed by the law of Scotland. If it depended on the law of England or of British Columbia, their right to abatement would be limited to the extent referred to in the judgment of Davies J.

J. C.
1909
BOW, MCLACHLAN & CO. v. SHIP "CAMOSUN."

Sir R. Finlay, K.C., and *C. R. Dunlop*, for the appellants, contended that the Exchequer Court had no jurisdiction or power to give effect to a claim pleaded as a set-off when it had no jurisdiction to entertain it if made the ground of a counter-claim or cross-action. The Court had not the general or common law jurisdiction of the High Court in England. The Admiralty jurisdiction of the High Court did not include authority to hear a claim for breach of a contract to build a ship in accordance with certain specifications; and the claim put forward in paragraph 7 of the defence could not be described as either legal or equitable set-off. The claim was in rem to enforce a registered mortgage to secure payment of money lent; the alleged set-off was a claim in personam arising out of a contract totally distinct from that of the mortgage. The validity of the mortgage was not disputed and it bound the ship, while the defence had nothing to do with the ship, but raised questions as to the terms of a building contract and their due fulfilment, which could and ought to be adjudicated upon in Scotland, where the appellants reside. Reference was made to *Mondel* v. *Steel* (1); *Government of Newfoundland* v. *Newfoundland Ry. Co.* (2); *Warwick* v. *Nairn* (3); Benjamin on Sales, 5th ed., p. 98; and as to the jurisdiction of the Court, to the Exchequer Court Act (Dominion), ss. 15 and 16; Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27) (Imperial), s. 2, sub-ss. 1, 2, and s. 3; the Admiralty Act, 1891 (54 & 55 Vict. c. 29) (Dominion), ss. 3, 4, 9, and 25; *The Cheapside* (4); and r. 63 of the Practice Rules of the Exchequer Court.

Butler Aspinall, K.C., and the *Hon. Malcolm Macnaghten*, for the respondents, contended that the Exchequer Court had jurisdiction in respect of the claim put forward in the said paragraph 7. By the Canadian Admiralty Act and the Imperial Colonial Courts of Admiralty Act, 1890, the Exchequer Court had jurisdiction over the like places, persons, matters, and things as the Admiralty jurisdiction of the High Court in England, and might exercise it in like manner and to as full an extent as the High Court in England. In a suit between mortgagee and mortgagor the Court

(1) (1841) 8 M. & W. 858.
(2) (1888) 13 App. Cas. 199.
(3) (1855) 10 Ex. 762.
(4) [1904] P. 339.

J. C.
1909
Bow, McLachlan & Co. v. Ship "Camosun."

will consider the whole transaction between the parties. The action was brought to enforce a security given for the payment of the price of a ship. In order to ascertain the amount due under that security it was necessary to ascertain what amount, if any, was at the date of the issue of the writ legally and properly due thereunder. That amount could not be ascertained without determining whether any and, if so, what amount ought to be set off against the agreed price by reason of the appellants' breach of contract or breach of warranty in and about the construction of the ship. Reference was made to the Sale of Goods Act, 1893, s. 53; *The Cathcart* (1); *The Benwell Tower* (2); *The Innisfallen.* (3)

Dunlop, in reply.

1909
July 23.

The judgment of their Lordships was delivered by

Lord Gorell. This appeal raises a question of considerable interest and importance as to the jurisdiction in Admiralty of the Exchequer Court of Canada.

The facts giving rise to the case are these:

The appellants are a shipbuilding company, having their office at Paisley, and in 1904 agreed with the respondent company (hereinafter called the respondents), whose office is at Vancouver, British Columbia, to build a steamship, afterwards called the *Camosun*, for 28,000*l.*, of which 5000*l.* was to be paid in cash on delivery, and the balance was to be treated as lent by the appellants and secured by mortgage.

The *Camosun* was accordingly built by the appellants at Paisley and delivered to Mr. Gordon Legg, the managing director of the respondents, on February 9, 1905. On the same day he was temporarily registered as owner, paid the appellants 5000*l.*, and mortgaged the vessel in the statutory form to them to secure the sum of 23,248*l.* and interest. The 248*l.* was for interest to the date of settlement. The consideration was stated in the mortgage to be 23,248*l.* "this day lent to me by Bow, McLachlan & Co., Limited," and the mortgage contained a covenant by Mr. Legg to pay to them the said sum with interest at

(1) (1867) L. R. 1 A. & E. 314. (2) (1895) 8 Maritime L. C. 13.
(3) (1866) L. R. 1 A. & E. 72.

J. C. 1909 — Bow, McLachlan & Co. v. Ship "Camosun."

6 per cent. per annum on May 9 then next, and that, if the said sum was not paid on that day, he would, during such time as the same or any part thereof remained unpaid, pay to them interest on the amount unpaid at 6 per cent. per annum by equal half-yearly payments on February 9 and August 9 in every year, and was expressed to be to secure the repayment in manner aforesaid of the said principal sum and interest. The mortgage was duly registered.

An agreement was subsequently entered into between the appellants and the respondents, signed by the former at Paisley on February 25, 1905, and by the latter at Vancouver on May 13, 1905. This agreement recited that the *Camosun* had been built to the order of the respondents for the sum of 28,000*l.* and was completed and made ready for sea, and that 5000*l.* had been paid, and provided for the payment of the balance with interest on the cost during construction, namely, 23,248*l.*, by yearly instalments, commencing with the payment of 5248*l.* on or before February 9, 1906, and 5000*l.* on or before each subsequent February 9 until the whole was paid off, with interest at 6 per cent. per annum from February 9, 1905, on the balance of price remaining unpaid from time to time. The first payment of interest was to be made on February 9, 1906, for the year previous to that date, and afterwards the interest was to be paid half-yearly on February 9 and August 9 in each year. In addition to the security of the said mortgage, the respondents agreed to give the appellants certain further security and to keep the vessel insured, and they also agreed that, if they failed to pay any of the instalments or half-yearly balance of interest when due, or failed to carry out any of the obligations undertaken by them under the agreement, the appellants should be entitled forthwith to enforce the mortgages or any of them, accounting to the respondents for the net proceeds of the vessel if sold.

The vessel proceeded to Vancouver, and was transferred by Legg to the respondents, who were then registered as her owners.

On February 9, 1906, there were due to the appellants 5248*l.* and 1380*l.* for one year's interest. The respondents tendered to the appellants 2990*l.*, being 1610*l.* on account of the 5248*l.*, and

1380*l.* in respect of the interest, but claimed to deduct from the 5248*l.* the sum of 3638*l.* in respect of expenses, loss, and demurrage which they alleged they had incurred because, as they alleged, the vessel was not properly built in accordance with the contract, and was built negligently and defectively. The amount tendered was received under protest, and an action in rem was at once commenced by the appellants in the Exchequer Court of Canada, British Columbia Admiralty District, to enforce the said mortgage for the sum of 21,638*l.*, which was, according to the statement of claim, the sum then alleged to be due in the circumstances on the mortgage, after giving credit for the payments received, unless the respondents were entitled to deduct the amount of their cross-claim. The vessel was arrested, but afterwards released on bail.

The appellants' statement of claim was in the usual form to enforce payment of the said sum of 21,638*l.* and interest.

The respondents delivered a defence and counter-claim, in which they did not dispute the validity of the mortgage and admitted the payments aforesaid, but they alleged there was no default. This allegation appears to have been based on their claim to reduce the amount payable by their cross-claim, and accordingly they put forward their claim by way of counter-claim in the action.

This counter-claim was on July 7, 1906, struck out on motion, by Morrison J., the deputy local judge in Admiralty, on the ground that the Exchequer Court of Canada in Admiralty had no jurisdiction to entertain it. An appeal to the judge of the Exchequer Court at Ottawa was dismissed with costs on September 13, 1906. The learned judge, Burbidge J., after referring to the statutes on which the point turned, said: "It is not contended that the Admiralty jurisdiction of the High Court in England includes jurisdiction to hear a claim for the breach of a contract to build a ship in accordance with certain specifications, but it is argued that, because a judge of the High Court in England has otherwise authority to hear and decide such a claim and might, if he saw fit, dispose of it as a counter-claim in an action in Admiralty (*The Cheapside* (1)), this Court has a like

(1) [1904] P. 339.

J. C.
1909
BOW, MCLACHLAN & CO. v. SHIP "CAMOSUN."

jurisdiction and authority. That, it seems to me, is not the effect of the statutes referred to. The jurisdiction which this Court may exercise under the statutes mentioned is the Admiralty jurisdiction, and not the general or common law jurisdiction of the High Court in England."

From this decision no appeal was brought, but an application was made by the respondents to Martin J., the local judge of the Exchequer Court, for leave to deliver an amended statement of defence. The proposed amendment was contained in the 7th paragraph of the amended defence. From this it appears that the respondents pleaded by way of equitable defence the same allegations as they had previously pleaded by way of counter-claim, and claimed that they were entitled to set off and deduct from the sums payable by them to the appellants the aforesaid sum of 3638*l.* alleged to have been expended by them.

Leave to file and serve the amended defence was given by the learned judge. He seems from his judgment to have considered that he would not be justified in excluding the proposed plea, and to have allowed it under r. 63 of the Practice Rules of the Exchequer Court. That rule provides that the defendant may in his statement of defence plead set-off and counter-claim, but that if, in the opinion of the judge, such set-off or counter-claim cannot be conveniently disposed of in the action, the judge may order it to be struck out. With regard to the discretion conferred by the rule, he considered it would not be more inconvenient to try the question in British Columbia than in Scotland, though it would doubtless be a difficult matter to dispose of anywhere satisfactorily.

This decision was affirmed on appeal by Burbidge J. on April 22, 1907, on the ground that, to the extent that the facts stated in the amendment entitled the respondents to an abatement in the price of the ship, such facts might be pleaded in defence to the appellants' action. He pointed out that the respondents had no right to set off special or consequential damages, and that some of the damages sought to be set off might only be the subject of a cross-action, but that would not be ground for striking out the whole paragraph pleading the amended defence.

It may be here noted that in any view of this case the amended plea read with the particulars delivered under it, so far as it is possible to ascertain by a perusal of the particulars, would shew no answer to the whole claim, but only to part thereof, as the particulars appear to include matters which would not go only to an abatement of the price, but to special or consequential damages.

After the amended defence had been put in, there were further pleadings and objections in law. These raised formally the right of the respondents to plead the 7th paragraph of the amended defence, which set forth the claim on which the respondents relied. The points of law were argued before Martin J., who, while considering that the appellants could raise their objection in law to the plea, notwithstanding that leave had been given to plead it, held that the previous judgment had substantially decided the point, and his order, which was made on September 25, 1907, was that the said 7th paragraph constituted a good defence in law pro tanto to the appellants' action, and that the respondents were at liberty to plead the same, and that the Court had jurisdiction to entertain the questions thereby raised.

An appeal from this order came before Burbidge J. at Ottawa on January 7, 1908, and was dismissed by him for the reasons which he had given on the previous application. The appellants appealed to the Supreme Court of Canada, and on June 16, 1908, that Court, consisting of the Chief Justice and Davies, Idington, and Duff JJ., dismissed the appeal. The Chief Justice dissented, but, owing to his absence on the day when the judgment was delivered, his judgment was announced by Davies J. without stating the reasons for dissent. Davies J. agreed, though entertaining many doubts, that the appeal should be dismissed.

Leave to appeal having been granted by the Supreme Court, this appeal was brought. It was not contended before this Board that the respondents had any right to deduct from the amount claimed by the appellants to be due on February 9, 1906, any sum for special or consequential damages arising from the alleged breach by the appellants of the building contract, but only that the respondents were entitled, if they proved the

J. C. 1909 BOW, MCLACHLAN & CO. v. SHIP "CAMOSUN."

alleged breach, to deduct such a sum as represents the difference at the time of delivery owing to the alleged breach between the vessel as she was and as she ought to have been according to the contract.

In order to determine the question it is in the first place necessary to consider the nature and extent of the jurisdiction of the Exchequer Court of Canada.

That Court was constituted by the Exchequer Court Act (50 & 51 Vict. c. 16) (Dominion) for the purpose of dealing with matters in which the Crown was concerned (ss. 15 and 16), and has no general common law jurisdiction. Its Admiralty jurisdiction is derived under the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27) (Imperial), and the Admiralty Act, 1891 (54 & 55 Vict. c. 29) (Dominion). The Act of 1890, so far as material, is as follows:

Sect. 2. "(1.) Every Court of law in a British possession which is for the time being declared in pursuance of this Act to be a Court of Admiralty . . . . shall be a Court of Admiralty, with the jurisdiction in this Act mentioned, and may, for the purposes of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction, ...

"(2.) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner, and to as full an extent as the High Court in England, ..."

Sect. 3. "The Legislature of a British possession may by any Colonial law (*a*) declare any Court of unlimited civil jurisdiction" [by s. 15 unlimited civil jurisdiction means civil jurisdiction unlimited as to the value of the subject-matter at issue or as to the amount that may be claimed or recovered], "whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such Court of its jurisdiction under this Act and limit territorially or otherwise the extent of such jurisdiction, and (*b*) confer upon any inferior or subordinate Court in that possession such partial or limited

Admiralty jurisdiction under such regulations and with such appeal, if any, as may seem fit. Provided that any such Colonial law shall not confer any jurisdiction which is not, by this Act, conferred upon a Colonial Court of Admiralty."

The Canada Admiralty Act, 1891 (Dominion), enacts:

Sect. 3. "In pursuance of the powers given by 'The Colonial Courts of Admiralty Act, 1890,' aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the said Act and by this Act.

"(4.) Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all rights and remedies in all matters (including cases of contract and tort and proceedings in rem and in personam), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty, under 'The Colonial Courts of Admiralty Act, 1890.'

"(9.) Every local judge in Admiralty shall, within the Admiralty district for which he is appointed, have and exercise the jurisdiction and the powers and authority relating thereto of the judge of the Exchequer Court in respect of the Admiralty jurisdiction of such Court.

"(25.) Any rules or orders of the Court made by the Exchequer Court for regulating the procedure and practice therein, including fees and costs, in the exercise of the jurisdiction conferred by 'The Colonial Courts of Admiralty Act, 1890,' and this Act, which requires the approval of Her Majesty in Council, shall be submitted to the Governor in Council for his approval, and, if approved by him, shall be transmitted to Her Majesty in Council for her approval."

J. C. 1909 — BOW, MCLACHLAN & CO. v. SHIP "CAMOSUN."

It is clear from these statutes that the jurisdiction of the Exchequer Court as a Court of Admiralty is no greater than the Admiralty jurisdiction of the High Court of England, and that the power to make rules for procedure and practice is confined to the making of rules for the exercise of the jurisdiction thus conferred, so that the 63rd rule of procedure above mentioned does not affect the case unless the defence or set-off is within the Admiralty jurisdiction.

The question thus arises, What is the Admiralty jurisdiction of the High Court in England with regard to such matters as that in controversy?

It was suggested by Idington J. that the Admiralty jurisdiction of the High Court in England had been altered by the Judicature Acts of 1873 and 1875, and he referred to s. 24 of the first of those Acts. Those Acts amalgamated the English Courts and transferred to the High Court all the jurisdiction which had been previously exercised by the different Courts, so that every judge of the High Court can exercise every kind of jurisdiction possessed by the High Court, but these changes conferred no new Admiralty jurisdiction upon the High Court, and the expression "Admiralty jurisdiction of the High Court" does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or may be conferred by statute giving new Admiralty jurisdiction. It is true that a judge of the High Court sitting in the Admiralty Division thereof may, as judge of the High Court, exercise any jurisdiction which is now possessed by a judge thereof, but he does so by virtue of the general jurisdiction conferred upon him, and not by virtue of any alteration in his Admiralty jurisdiction. In their Lordships' opinion this case is unaffected by the Judicature Acts, and upon this point they agree with the opinions expressed by Morrison J. and Burbidge J., who struck out the counter-claim, although the respondents might have made it if the Judicature Acts applied so as to alter the Admiralty jurisdiction into a general jurisdiction.

Proceeding then with the consideration of what is the Admiralty jurisdiction of the High Court in such a case, it must be pointed out that, under that jurisdiction, no claim could be

made formerly by a mortgagee of a ship to enforce his mortgage, nor by either party for breach of a contract for the building of a ship. The history of the long contest between the civilians of the Admiralty Court and the Courts of common law is well known and need not be gone into now. It resulted in the Admiralty jurisdiction being confined within certain well-defined limits, which were, however, extended by the Legislature in more modern times, but not sufficiently to include a suit to enforce such a claim as that made by the respondents.

With regard to mortgages, the Act 3 & 4 Vict. c. 65 provided (s. 3) that whenever any ship or vessel should be under arrest by process issuing from the High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested should have been brought into Court and be in the registry of the said Court, in either such case the Court should have full jurisdiction to take cognizance of all claims or causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively. The object of this was to enable the Court in the cases mentioned to take cognizance of claims by mortgagees of ships to enforce their mortgages in suits and to intervene to protect their property. This remedy being found to be inadequate, it was enacted by the 11th section of the Admiralty Court Act, 1861, that the Admiralty Court should have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854 (now the Act of 1894), whether the ship or proceeds thereof were under arrest of the said Court or not. These sections seemed to be confined to claims by mortgagees. It is under the jurisdiction conferred by the later Act that the appellants proceeded in this case.

With regard to the building of a ship, the 4th section of the last-mentioned Act gave the Admiralty Court jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court.

The appellants could not have proceeded under this section for the price of the vessel unless she, or the proceeds of her,

J. C. 1909 BOW, MCLACHLAN & CO. v. SHIP "CAMOSUN."

were under arrest, and the respondents could not proceed under it for damages for breach of the building contract, whether there was an arrest or not.

Therefore, as the Exchequer Court had no general common law jurisdiction, and the respondents had no right under the Admiralty jurisdiction to proceed either against the ship or the appellants, they could not enforce their counter-claim in that Court.

The ground upon which they have been permitted to put forward their claim as a defence pro tanto, so far as it is for a difference in value resulting from an alleged breach of the building contract by the appellants, is either that it may be treated as a set-off or as justifying a reduction in the price on the principles indicated in the case of *Mondel* v. *Steel* (1), and that therefore the amount due on the mortgage may be lessened to the extent of the aforesaid difference; that is to say that though they cannot put forward a counter-claim, they can put forward a defence pro tanto. Let it be assumed that any matter which affords a defence, in the ordinary sense of the term, to a mortgage claim can be set up under the Admiralty jurisdiction, it remains to be seen whether the respondents' contention in this case is sound.

Now, in the first place, it is to be observed that the claim is to enforce under the mortgage deed a debt which it was agreed should be treated as due from the respondents to the appellants as money lent, and that it is no answer by way of set-off to such a claim to seek to reduce it by unliquidated damages claimed under another contract. Cases such as *Mondel* v. *Steel* (1) do not proceed upon any principles of set-off (which depend upon the statutes of set-off), but upon another and different principle, not of law, but of practice.

This principle is very clearly stated in the case just mentioned. In former days it was held that where an article had been supplied under a contract at an agreed price, and the buyer had taken delivery and retained the article and was sued for the price, his remedy for breach of contract resulting in a diminution of value of the article was by a cross-action for damages, and

(1) 8 M. & W. 858.

that he could not set off or deduct the sum he claimed. An early case of this character is that of *Broom* v. *Davis* (1), before Buller J. Afterwards Lord Kenyon in another case (2) seemed to be of opinion that the buyer ought to be allowed to deduct the difference in value. The following passage from the judgment of Parke B. in *Mondel* v. *Steel* (3) shews how the practice became changed: "Formerly it was the practice, where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. . . . . But after the case of *Basten* v. *Butter* (1) a different practice . . . . began to prevail, and, being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to shew that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value."

Similar views were expressed in the case of *Davis* v. *Hedges* (4) by Hannen, Lush, and Blackburn, then Justices of the Court of Queen's Bench, where the change of practice is referred to as being introduced to prevent circuity of action.

It seems clear that the change was made, not upon any principle of law, but upon grounds of convenience, in order to prevent circuity of action. Before the statutes of set-off, it was necessary to bring cross-actions in respect of debts on the one side and on the other, and, except in the cases referred to by Parke B., no change was, as a matter of strict law, made with regard to unliquidated damages until the Judicature Acts.

No instances were cited to their Lordships of any cases in which this procedure had been adopted, except such as are

(1) (1794) 7 East, 479, in notes to *Basten* v. *Butter*.
(2) *King* v. *Boston*, (1789) ibid. at p. 481.
(3) 8 M. & W. at p. 870.
(4) (1871) L. R. 6 Q. B. 687.

J. C. 1909 BOW, MCLACHLAN & Co. v. SHIP "CAMOSUN."

referred to by Parke B.; and, indeed, in the cases where a seller or supplier had taken a bill of exchange for the price, the buyer has been left to his cross-action, unless there has been a total failure of consideration: *Warwick* v. *Nairn.* (1)

The mortgage in question, though a security for the balance of price and interest, is expressed as usual to be in consideration of money lent, and to secure the repayment of that money and interest, and the covenant is for the payment thereof: see Form B, Merchant Shipping Act, 1894. It is not expressed to be for securing the repayment of the amount due on the building contract, and it does not refer to that contract. The builders would, no doubt, be desirous of having a security which they could assign, if necessary, so as to keep them in funds, for the contract contained no provisions for giving bills for the instalments, which bills could be discounted, as is frequently done, and they would also wish that they or their assignees should be in a position to enforce their mortgage against the vessel, wherever she might be, and whoever might then be her owners, so that their claim would be simply for the amount made payable by the mortgage, and, if those who became defendants in proceedings to enforce it had any claim against the holders of the mortgage which the Court had jurisdiction to enforce, the latter would have to meet it as a cross-claim. The respondents' counsel argued that the position was in effect the same as if the appellants were suing on the building contract, and that, therefore, the amount which they could sue for was only the amount due under that contract after an abatement had been made. But that would be to extend the practice above referred to beyond the only cases in which it has been permitted, and to place the appellants at a disadvantage in proceeding upon their mortgage. Upon such a document they are in effect much in the same position as the sellers who were holders of the bills of exchange in the cases above alluded to, where the claim is on one contract and the cross-claim on another, whereas the cases relied on by the respondents are all cases in which the action was brought on the original contract, and the abatement was claimed for breach of it. Considerations which may apply to a claim and cross-claim on the same contract

(1) 10 Ex. 762.

do not necessarily apply to a case where the claim is on one document, admitting on its face the amount of the debt due under it, and the cross-claim is in respect of damages claimed under another contract. It seems necessary to consider the matter strictly, for if the practice referred to were extended to a statutory mortgage of a ship, such as that in question, inconveniences might readily arise. The defendant may well be left to his cross-claim or, in England since the Judicature Acts, and in any Courts of general jurisdiction which allow counter-claims, to his counter-claim.

Burbidge J. in his judgment puts the question, What good reason exists or can be suggested for refusing permission to set out the facts as a defence to an action on a mortgage given to secure the stipulated price? The most important reason in the present case does not appear to have been fully presented to the learned judges in Canada. The change of practice, as stated in *Mondel* v. *Steel* (1), was based upon convenience in order to avoid circuity of action, and the Courts were dealing with actions in which they had jurisdiction in the action for the price, and also jurisdiction in an action which might be brought to enforce the cross-claim in which both the damages which might be treated as an abatement and special or consequential damages could be recovered, and it was not unreasonable to permit the former to be proved to reduce the price without putting the defendant to the expense of a cross-action.

But a totally different position arises when the Court in which the action to recover the debt is brought has no jurisdiction to entertain a cross-action by the defendant to recover from the plaintiff damages for breach of the contract. In such a case the matter cannot be treated as one of mere convenience.

This is the position in the present case. The real contest between the parties is with regard to a matter which is not a defence proper, and over which, if put forward as a claim, the Exchequer Court had no jurisdiction, whether the claim were against the ship or the plaintiffs. This contest should be left to be settled by a cross-action in a Court having jurisdiction to entertain it.

(1) 8 M. & W. 858.

J. C.
1909
BOW, MCLACHLAN & CO. v. SHIP "CAMOSUN."

The importance to the parties of deciding this case according to their strict rights is that upon the decision as to the plea under consideration depends the place of trial of the real dispute in the case. It is obvious that this is, in the circumstances, the reason for excepting to the jurisdiction of the Court to hear and determine the issue raised by the plea.

For these reasons their Lordships will humbly advise His Majesty to allow the appeal, to set aside the judgment of the Supreme Court of Canada dated June 16, 1908, and the judgments of the Exchequer Court of Canada dated respectively January 7, 1908, and September 25, 1907, and to sustain the appellants' objections in law that the Exchequer Court of Canada had no jurisdiction to entertain the questions raised by the 7th paragraph of the respondents' amended statement of defence, and to order the respondents to pay the costs of and incidental to the argument upon the said objections in the Courts in Canada.

The respondents must pay the costs of this appeal.

Solicitors for appellants: *Lowless & Co.*
Solicitor for respondents: *Fred. F. Macnaghten.*

[PRIVY COUNCIL.]

BADAR BEE . . . . . APPELLANT; J. C.*

AND 1909

HABIB MERICAN NOORDIN AND OTHERS . RESPONDENTS. *May* 11, 12; *July* 20.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF PENANG).

Construction of Will—Destination of the Subject of Void Gifts—Residuary Legatees—Next of Kin—Res judicata.

The appellant petitioned to have it declared that the devise and gifts contained in the 6th clause of the testator's will were void, and that the lands comprised therein and the income thereof being undisposed of belonged to the testator's next of kin. It appeared that in 1872 the Court in a suit relating to the same will had declared the said gifts to be void and that they "fell into the undevised residue of the testator's estate"; that thereafter the gifts which were of annual sums were paid to the testator's next of kin with the assent of all parties interested, and that in 1891 in another suit relating to the same clause the Court had declared that the defendants, who included the trustees of the will, were estopped from contending that the said annual sums were not wholly undisposed of:—

Held, overruling the judgment of the Court below, that the decision of 1872 as to the true construction of clause 6 applied to the corpus of the property comprised therein and was not limited to the gifts of the annual sums and was res judicata against the claim of the respondents, the residuary legatees.

APPEAL by special leave from a decree of the Supreme Court (July 4, 1905) which ordered that so much of a judgment of Law J. (August 11, 1903) as declared that certain lands mentioned in clause 6 of the will of the testator Mahomed Noordin were at the death of the testator vested in the respondent Habib Merican Noordin and one Mahomed Nassaroodin Merican Noordin in trust for the next of kin of the testator should be set aside, and whereby also the Court declared that the said lands were vested in the said trustees in trust for the persons entitled to the residue of the testator's estate, save and except two yearly sums amounting to $700 given by the testator by clause 6 of the said will for special

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ANDREW SCOBLE.

J. C. 1909

BADAR BEE v. HABIB MERICAN NOORDIN.

kandoories, which said yearly sums amounting to $700 were declared to be payable to the next of kin of the testator.

By the said 6th clause the testator devised to his trustees the lands in Penang the subject of appeal, and directed that they should be called the wakkoff (*sic*) of Mahomed Noordin, and that his executors and trustees should, out of the residue of the rents and profits thereof, after deducting expenses and repairs, pay every year the following sums :—

1. To the managing body of a school in Chulia Street for the learning of certain languages, $20 per month.

2. For the maintenance of the testator's daughter Tengachee Mah (now deceased), $60 per month to be paid to her and her lawful issues during their natural lives for their separate use, without power of anticipation.

3. $40 per month to be paid to Sheik Meydin for the maintenance of Kulsome Beebee and Habib Merican Noordin, to be paid to him as long as the terms of a certain settlement were in force, and after the same had become void after the decease of the said Kulsome Beebee to continue to be paid to the said Habib Merican Noordin for the use of himself and any of his lawful issues during his and their natural lives.

And the residue of the rents and profits of the said devised premises upon trust to expend for the yearly performance of kandoories and entertainments for the testator and in his name, to commence on the anniversary of his decease according to the Mahomedan religion or custom, such kandoories and entertainments to continue for ten successive days every year, and also in the performance of an annual kandoorie in the names of all the prophets, or to expend the same in giving a kandoorie or feast according to the Mahomedan religion or custom to the poor for ten successive days every year from the anniversary of his decease to the extent of $300, including the cost of lighting up a mosque, burial place and schoolrooms. And also to give kandoories or feasts to the poor as aforesaid once in every three months to the extent of $100, and provided there should remain any surplus moneys, then the same to be expended in purchasing clothes for distribution to the poor.

By clause 7 the testator gave and devised to his trustees all

the rest and residue of his real estate in Penang and Province Wellesley or elsewhere upon trust for division into twenty-four shares, and that such shares should be held upon the trusts in the said clause 7 mentioned for the benefit of the testator's children and grandchildren therein in that behalf named and their issue.

Considerable litigation took place in the Colony with regard to the will and is sufficiently narrated in their Lordships' judgment so far as material to the points decided in this appeal, namely, (1.) whether certain lands known as the wakkoff of Mahomed Noordin and the rents and profits thereof (the trusts whereof declared by the said will have failed) devolve as upon an intestacy or pass under an alleged residuary gift contained in the will, and (2.) whether or not the parties claiming under the said alleged residuary gift are not estopped from disputing the title of the parties claiming under an intestacy. The proceedings out of which this appeal arose were commenced by Tengachee Nachiar's petition in February, 1902. The main relief claimed was a declaration that the devise of the lands, buildings, and premises contained in the 6th clause of the said will was void, and that the gifts (1.) of the sum of $20 for the school in Chulia Street, Penang, (2.) of $60 per month for the maintenance of Tengachee Mah, (3.) of $40 per month for the maintenance of Kulsome Beebee and the respondent Habib Merican Noordin, and (4.) of the residue for purchasing clothes for the poor were also void, and that the said lands, buildings, and premises and the income thereof being undisposed of belonged to the next of kin of the testator. The result of this litigation is stated in their Lordships' judgment.

Levett, K.C., and *Christopher James*, for the appellant, contended that the variations made by the decree appealed from in the decrees of February 4, 1904, and August 11, 1903, recited in their Lordships' judgment, were erroneous, and that it ought to be declared that the whole of the rents and profits and corpus of the lands and premises devised by clause 6 (subject only to the two monthly payments of $20 and $40) became vested in the trustees of the will in trust for the

J. C. 1909

BADAR BEE v. HABIB MERICAN NOORDIN.

testator's next of kin or persons deriving title from them as being estate of the testator undisposed of by his will. It was contended that it was res judicata by the decrees of March 13, 1872, and March 20, 1891, or one of them, and that all interests in the lands comprised in clause 6 which were not validly and effectually devised thereby were wholly undisposed of by the testator. The respondents and all persons claiming to be residuary legatees were estopped from denying that those interests were undisposed of by the will and consequently vested in the next of kin. Subject to the said two monthly payments the devolution of the residue of rents and profits after payment of the sums amounting to $700 per annum (which the Court below held to be payable to the next of kin) is governed by and in law follows the devolution of the said sum of $700; and clause 7 on its true construction does not contain any residuary devise or gift which includes any interest in real estate comprised in clause 6. They referred to the *Duchess of Kingston's Case* (1); *Barrs* v. *Jackson* (2); *Alison's Case* (3); *Reg.* v. *Hutchings* (4); *Peareth* v. *Marriott* (5); *Priestman* v. *Thomas* (6); *Concha* v. *Concha* (7); *In re South American and Mexican Co., Ex parte Bank of England* (8); *In re Lart.* (9)

Astbury, K.C., and *Sargant*, for the respondents, contended that the residuary devise in clause 7 was amply sufficient to cover the property in dispute in this appeal. It comprised on its true construction any specific devise or gift which might fail for any reason whatever. The judgment of March 13, 1872, left it doubtful whether the declaration that the annual gift of $700 fell into the undevised residue meant that the gift should pass to the residuary legatees or the next of kin in default of any disposition at all. The trustees put their own construction upon it and divided it amongst the next of kin. The residuary legatees were numerous and did not consider it worth while to contest the point in reference to their several shares of so small a sum. But it was contended that that did not estop them

(1) (1776) 2 Sm. L. C., 11th ed., p. 731.
(2) (1842) 1 Y. & C. 585, 597; S. C. in appeal, (1845) 1 Ph. 582.
(3) (1873) L. R. 9 Ch. Ap. 1.
(4) (1881) 6 Q. B. D. 300, 304.
(5) (1882) 22 Ch. D. 182.
(6) (1884) 9 P. D. 70, and in appeal, ib. 210.
(7) (1886) 11 App. Cas. 541, 552.
(8) [1895] 1 Ch. 37.
(9) [1896] 2 Ch. 788.

from raising the question now in reference to the corpus of the estate comprised in the clause. There is no authority that estoppel as to one claim has any relation to another claim. In *Peareth* v. *Marriott* (1) the identical point had been decided, and *Barrs* v. *Jackson* (2), it was contended, is in favour of the respondents. Reference was made to *Concha* v. *Concha* (3); *Priestman* v. *Thomas*. (4) In *Reg.* v. *Hutchings* (5) the grounds of decision were held not to create estoppel, which was exactly in point.

Levett, K.C., in reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The controversy on this appeal is limited to a question between the representatives of the next of kin of Mahomed Noordin living at the time of his death and the persons beneficially interested under his will in his residuary real estate, who are generally called "the residuary legatees" in the various proceedings to which the testator's will has given rise.

The testator died in April, 1870. His will, dated May 10, 1869, was duly proved in May, 1870. By the 6th clause he gave certain lands in Penang, which he directed to be called "the wakkoff of Mahomed Noordin," to trustees for certain purposes. Of those purposes two, and two only, are now subsisting, undetermined and capable of taking effect. One is the payment of $20 per month to the managing body of a school in Chulia Street, Penang; the other is the payment of $40 per month for the maintenance of one Kulsome Beebee and her husband, Habib Mahomed Merican Noordin, a son of the testator, with remainders over.

There has been a great deal of litigation about the construction of the testator's will. The effect of it, so far as material to the present question, may, however, be stated shortly.

By a decree of the Supreme Court of the Straits Settlements, made by Sir William Hackett C.J., in March, 1872, it was declared that the gifts of two sums, amounting together to $700

(1) 22 Ch. D. 182.
(2) 1 Y. & C. 585.
(3) 11 App. Cas. 541, 552.
(4) 9 P. D. 70, 210.
(5) 6 Q. B. D. 300.

J. C. 1909 BADAR BEE v. HABIB MERICAN NOORDIN.

per annum, for the performance of kandoories or Mahomedan feasts for the poor for ever (being one of the purposes to which the income of the wakkoff was to be applied) were void, as not being lawful charitable gifts, and "that the gifts fell into the undevised residue of the testator's estate."

Under this decree the sum of $700 per annum out of the rents and profits of the wakkoff was for some years, and apparently with the assent of all parties interested, paid to the testator's next of kin. At some time, however, before the year 1889 the trustees ceased to make any payments either to the next of kin out of the income of the wakkoff or to the residuary legatees out of the income of the testator's residuary real estate.

In 1889, in a suit numbered 229 of 1889, relief was sought by the plaintiff in that suit, who was apparently one of the next of kin and also one of the residuary legatees, in respect of the annual sum of $700 and in respect of the testator's residuary real estate. The trustees, who were made defendants, set up various defences. Among other grounds of defence they alleged that they had been advised that the said sum of $700 per annum was payable under Sir William Hackett's decree to the residuary legatees and not to the next of kin. In reply to this defence the plaintiff, who sued on behalf of herself and all other persons in the same interest, pleaded (1.) that the defendants were estopped from contending that the $700 was not payable to the next of kin, and (2.) that the decree of 1872 remained in full force, and that the points raised in the suit in which that decree was made and those pleaded in the then pending suit were the same.

By a decree made on March 20, 1891, Goldney J. declared that the defendants were estopped from alleging that the sum of $700 was not wholly undisposed of by the will, and various consequential accounts and inquiries were directed.

On August 11, 1903, by the decree of Law J. on the petition of the only daughter of the eldest son of the testator, who was the original appellant in this appeal, it was declared that the property comprised in the wakkoff of Mahomed Noordin was at the death of the testator vested in his trustees and executors in trust for the next of kin of the testator living at the time of his death, subject to the monthly payments of $20, $60, and $40,

and that the property was then vested in the respondents, in trust for the next of kin of the testator or their personal representatives, subject to the said monthly payments of $20 and $40 only, the monthly payment of $60 having lapsed since the testator's death.

From this decree there was an appeal, and on February 4, 1904, it was declared by the Court of Appeal that the whole of the rents and profits of Mahomed Noordin's wakkoff were (subject to the monthly payment of $20 to the school in Chulia Street and to the monthly payment of $40 for the maintenance of Kulsome Beebee and Habib Mahomed Merican Noordin) vested in the trustees as part of the undisposed residue of the testator's estate, and the Court reserved the question whether the said residue should pass to the residuary legatees or to the next of kin.

On July 4, 1905, on the appeal coming on for further hearing, the Court ordered that the interlocutory judgment of February 4, 1904, should be varied by omitting the word "undisposed" before the word "residue," and that so much of the judgment of August 11, 1903, as declared that the lands mentioned in clause 6 of the will were at the death of the testator vested in the trustees in trust for the next of kin should be set aside; and the Court declared that the said lands were vested in the said trustees in trust for the residuary legatees, save and except the two yearly sums amounting to $700, which yearly sums were payable to the testator's next of kin, and the Court affirmed the decree of August 11, 1903, save as varied by their judgment and the interlocutory judgment of February 4, 1904, as amended by the decree.

The ground of the decision was, as appears from the opinion delivered by Cox C.J., in which his colleagues concurred, that the residuary legatees were estopped by the judgment of Hackett C.J. so far as regarded the yearly sum of $700 which had always been dealt with as belonging to the next of kin. "Their right to it," said the Chief Justice, "has been expressly recognized by the judgment of Goldney J. of the 20th of March, 1891, in suit 229 of 1889. The decree in that case was subsequently served on such of the legatees as were not parties to the

J. C. 1909

BADAR BEE v. HABIB MERICAN NOORDIN.

suit, and is therefore binding upon them (Civil Procedure Ordinance, s. 122). I am of opinion we must hold, as was held in the judgment referred to, that the legatees are estopped from denying the right of the next of kin to the sum of $700, which should be paid to the next of kin as heretofore. But I am unable to carry the estoppel further. This sum forms a small portion (about one-twelfth) of the total income yielded by the properties mentioned in clause 6, and I can find nothing in the case from which it can be inferred that the next of kin have been recognized as entitled to anything beyond the $700. I hold, therefore, that the legatees are estopped only with regard to the $700, and that the rest of the property must pass to them."

From the order of July 4, 1905, this appeal has been brought on behalf of the next of kin. On their behalf it was submitted that the order appealed from should be reversed or varied, and that it should be declared that the whole of the rents and profits of the wakkoff and the corpus thereof, subject only to the monthly payments of $20 and $40, became vested in the trustees for the next of kin of the testator, or the persons deriving title under them, as undisposed of estate of the testator.

It appears to their Lordships that the decree of Sir William Hackett C.J. of March 13, 1872, was a decision on the construction of the testator's will as to the destination of funds released from the operation of the trust declared by the 6th clause of the will. The records of the Court do not shew whether that decree was or was not pronounced in the presence of, or served upon, all parties interested in the question. But it appears from the judgment of Cox C.J., already quoted, that the decree of March 13, 1872, was recognized or reaffirmed by the decree pronounced by Goldney J. on March 20, 1891, in suit No. 229 of 1889, and that the latter decree was duly served on such of the residuary legatees as were not parties to the suit, and is therefore binding upon all the residuary legatees.

The result is that it appears that the point raised by this appeal has already been adjudicated upon. There is here, as there was in the case of *Peareth* v. *Marriott* (1), to which Mr. Levett referred, a decree inter partes on the very same subject.

(1) 22 Ch. D. 182.

In the words of the Digest, lib. xliv., t. 2, s. 7, "exceptio rei judicatæ obstat quotiens eadem quæstio inter easdem personas revocatur." It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time. Nor can the residuary legatees be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute.

Their Lordships will therefore humbly advise His Majesty that the order appealed from should be varied by omitting so much thereof as purports to vary the decree of August 11, 1903, and to amend the interlocutory judgment of February 4, 1904.

Their Lordships think that, in the peculiar circumstances of the case, the costs of all parties may be paid out of the estate as between solicitor and client.

Solicitors for appellant: *Budd, Johnson & Jecks.*
Solicitors for respondents: *Rawle, Johnstone & Co.*

[PRIVY COUNCIL.]

J. C.*
1909
July 7, 8, 30.

JAMES BAY RAILWAY COMPANY . . . DEFENDANTS;

AND

SAMUEL W. ARMSTRONG . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA AND FROM THE HIGH COURT OF JUSTICE FOR ONTARIO.

Canada Railway Act, 1903, *s.* 168—*Supreme and Exchequer Courts Act, R. S. C.*, 1886, *c.* 135, *s.* 26—*Construction—Appeal from an Award to High Court—Further Appeal to Supreme Court incompetent.*

Held, that according to the true construction of s. 168 of the Canada Railway Act, 1903, the appeal given thereby to a superior Court from an award under that Act lies in the province of Ontario to either the Court of Appeal or the High Court of Justice therein at the option of an appellant; but that in case of appeal to the High Court, inasmuch as it is not the Court of last resort in the province within the meaning of the Supreme and Exchequer Courts Act, R. S. C., 1886, c. 135, s. 26, there is no appeal therefrom to the Supreme Court of Canada.

APPEAL by special leave from a judgment of the Supreme Court (March 19, 1907) dismissing for want of jurisdiction an appeal thereto from a judgment of the High Court (Meredith C.J., May 2, 1906) increasing the amount of an award of compensation made under the Canada Railway Act, 1903, now being R. S. C., 1906, c. 37, for expropriation of the respondent's land. It was also by the same special leave an appeal from the judgment of the High Court. The question decided by their Lordships was whether the appeal to the Supreme Court was competent.

It appeared that the respondent had cross appealed to the Supreme Court, claiming that the amount of the award in his favour should be still further increased. But the Supreme Court raised the point that it had no jurisdiction, it having been decided in *Ottawa Electric Co.* v. *Brennan* (1) that the Supreme Court could not give leave to appeal per saltum unless an appeal

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD COLLINS, and SIR ARTHUR WILSON.

(1) (1901) 31 Sup. Ct. Can. 311.

lay from the High Court to the Court of Appeal; and after argument it held that it had no jurisdiction, and thereupon dismissed without costs the appeal, cross-appeal, and an application for leave to appeal.

The principal sections material to the case are as follows:

By s. 168 of the Railway Act, 1903, it is provided that—

"(1.) Whenever the award exceeds six hundred dollars any party to the arbitration may within one month after receiving a written notice from any one of the arbitrators or the sole arbitrator, as the case may be, of the making of the award, appeal therefrom upon any question of law or fact to a superior Court, and upon the hearing of the appeal the Court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in a case of original jurisdiction.

"(2.) Upon such appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from a decision of an inferior Court to the said Court, subject to any general rules or orders from time to time made by the said last-mentioned Court in respect of such appeals, which orders may amongst other things provide that any such appeal may be heard and determined by a single judge.

"(3.) The right of appeal hereby given shall not affect the existing law or practice in any province as to setting aside awards."

By the interpretation clause of the said Act, s. 2 (*f*), the expression "Court" is defined to mean "a superior Court of the province or district," and in the General Interpretation Act, R. S. C., 1906, c. 1, s. 34 (26.), "superior Court" is defined to mean (*a*) "in the province of Ontario the Court of Appeal for Ontario and the High Court of Justice for Ontario"; (*b*) "in the province of Quebec the Court of King's Bench and the superior Court for the said province."

The Supreme and Exchequer Courts Act, R. S. C., 1886, c. 135, s. 24 (*a*) and (*f*), provide for an appeal to the Supreme Court, as follows:

"(*a*) From all final judgments of the highest Court of final resort now or hereafter established in any province of Canada, whether such Court is a Court of Appeal or of original

J. C. 1909

JAMES BAY RAILWAY v. ARMSTRONG.

jurisdiction, in cases in which the Court of original jurisdiction is a superior Court;

"(*f*) From the judgment, rule, order or decision upon any motion to set aside an award, or upon any motion by way of appeal from an award made in any superior Court in any of the provinces of Canada other than the province of Quebec."

Sect. 26 is—

"Except as otherwise provided for in this Act or in the Act providing for the appeal, no appeal shall lie to the Supreme Court but from the highest Court of last resort having jurisdiction in the province in which the action, suit, cause, matter, or other judicial proceeding was originally instituted, whether the judgment or decision in such action, suit, cause, matter, or other judicial proceeding was or was not a proper subject of appeal to such highest Court of last resort."

Sir R. Finlay, K.C., *Armour, K.C.*, and *Tyrrell Paine*, for the appellants, submitted that the Supreme Court ought to have entertained the appeal. Jurisdiction to do so was expressly given by s. 24 (*a*) and (*f*) of the Supreme Court Act, R. S. C., 1886, c. 135, the judgment of the High Court being a final judgment of the highest Court of final resort within the meaning of that sub-section. Reference was made to s. 26 of the same Act and it was contended that it must be read subject to s. 24 (*f*). Sect. 26 applies only to cases originally instituted in a Court which does not include the case of an award. Otherwise ss. 24 and 26 are inconsistent, and it is not essential in every case that the appeal should be from the highest existing Court in a province provided that it comes from a superior Court from which in the circumstances no further appeal in the province could be taken. It could not have been intended that a party dissatisfied with an award should by appealing therefrom to the High Court preclude by his own act a further appeal to the Supreme Court. Reference was made to the General Interpretation Act, R. S. C., 1906, c. 1, s. 34 (26.); the Judicature Act, R. S. O., 1897, c. 51, s. 25, ss. 49 and 50 (replaced by 4 Edw. 7, c. 11, s. 2), ss. 66 and 67, ss. 74 and 75; and to *Ottawa Electric Co.* v. *Brennan.* (1)

(1) 31 Sup. Ct. Can. 311.

Sect. 168 of the Canada Railway Act, 1903, on its true construction, having regard to its context, did not mean by "superior Court" either the High Court or the Court of Appeal, but gave an appeal to the former subject to appeal to the latter, and therefore the Supreme Court had jurisdiction to give leave to appeal per saltum. Another construction of s. 168 is that superior Court means the Court of Appeal only. The practice and proceedings in an appeal from an award are directed to be the same as on an appeal from an inferior Court to the said Court. In other provinces the finality of a decision by a superior Court is not upheld: see *Atlantic and North-West Ry. Co.* v. *Wood.* (1) Reference was also made to *Reist* v. *Grand Trunk Ry. Co.* (2); *Burke* v. *Grand Trunk Ry. Co.* (3)

Du Vernet, K.C., and *Herbert Chitty*, for the respondent, contended that the judgment of the High Court was final and that no appeal lay therefrom under s. 168 of the Railway Act of 1903. It was contended that the true construction of that section was that superior Court meant in the province of Ontario the Court of Appeal for that province. In that view the High Court had no jurisdiction; but if it had jurisdiction the appeal to it exhausted the right of appeal. Reference was made to *Archambault* v. *Archambault* (4) and to *Birely* v. *Toronto, Hamilton, and Buffalo Ry. Co.* (5) The latter was a case under s. 161 of the Dominion Railway Act (51 Vict. c. 29), similar to the s. 168 under discussion. There it was held that there was concurrent appellate jurisdiction by the two Courts, that the appellant might appeal to either, and that the decision of the High Court was final, no further appeal being given by the section. See also *Ex parte Clergue* (6); *Canadian Pacific Ry. Co.* v. *Blain* (7); *In re Canada Southern Railway and Norvall et al.* (8); Safford and Wheeler, Privy Council Practice, p. 887. As to the right of appeal to the Supreme Court of Canada reference was made to *Macdonald* v. *Abbott* (9); *Danjou* v. *Marquis* (10); *Barrington* v. *City of*

(1) [1895] A. C. 257.
(2) (1857) 6 Upp. Can. Rep. C. P. 421.
(3) Ibid., p. 486.
(4) [1902] A. C. 575.
(5) (1898) 25 Ont. App. Rep. 88.
(6) 1903] A. C. 521.
(7) [1904] A. C. 453.
(8) (1877) 41 Upp. Can. Rep. Q. B. 195.
(9) (1879) 3 Sup. Ct. Can 278.
(10) (1879) 3 Sup. Ct. Can. 251.

J. C.
1909
JAMES BAY RAILWAY v. ARMSTRONG.
1909
July 30.

Montreal (1); *City of Ste. Cunégonde* v. *Gougeon* (2); *Hull Electric Co.* v. *Clement* (3); *Farquharson* v. *Imperial Oil Co.* (4)

Sir R. Finlay, K.C., in reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal by special leave from an order of the Supreme Court of Canada, dismissing as incompetent an appeal and a cross-appeal from a judgment of the High Court of Ontario in the matter of an arbitration under the Canada Railway Act, 1903.

The original question was, What sum was payable as compensation to the respondent Armstrong in respect of a strip of land belonging to him taken by the James Bay Railway Company for the purposes of their undertaking? The land taken was a little more than three acres in extent. It was part of a dairy and grain farm situated about ten miles from the city of Toronto. The parties were unable to come to terms. So each named an arbitrator, and the two arbitrators appointed a third. Eight days were employed, or wasted, in determining the simple question referred to arbitration. The oral evidence occupied six whole days. In the record it takes up more than 250 printed pages. In addition to the difficulty of sifting and weighing such a mass of undigested evidence, the issue was complicated and, to some extent, confused by an offer on the part of the company of a cattle-pass under the track of the railway which, in crossing Armstrong's farm, was raised on an embankment a few feet above the surface of the adjoining land. The offer was not accepted, as the conditions with which it was accompanied made the proposed accommodation, in the opinion of the claimant's advisers, worse than useless. But it was discussed at some length in the evidence at the hearing before the arbitrators. The arbitrators differed in opinion. The award was made by a majority consisting of the arbitrator appointed by the railway company and the third arbitrator. They assessed the compensation at the sum of $1170, which was just $2 50c. under the sum offered by the railway company. The dissenting arbitrator,

(1) (1895) 25 Sup. Ct. Can. 202.
(2) (1895) 25 Sup. Ct. Can. 78.
(3) (1909) 41 Sup. Ct. Can. 419.
(4) (1899) 30 Sup. Ct. Can. 188.

who is said to be the official arbitrator for the province, stated that he thought the amount of the award should have been $3809. Armstrong appealed from the award to the High Court of Ontario. The jurisdiction of that Court under s. 65 of the Ontario Judicature Act (R. S. O., 1897, c. 51) is exercised by a single judge. The appeal was heard by Meredith C.J. It was heard by him according to the ordinary practice in such cases, and without any objection on the score of jurisdiction. The learned Chief Justice increased the award to $2250 and ordered the railway company to pay the costs of the appeal. The railway company then appealed as of right to the Supreme Court, and Armstrong also entered a cross-appeal, claiming a larger sum than that which was given him by the High Court. The Supreme Court, after argument, rejected both the appeal and the cross-appeal as incompetent. Then an application was made for special leave to appeal on the ground that there was much doubt and difficulty as to the proper course to be pursued in the case of appeals from awards made under the Canada Railway Act. Their Lordships thought proper to advise His Majesty to grant special leave to appeal from the order of the Supreme Court and also from the judgment of the High Court, in order that the whole case might be before this Board, and the expense and delay of a hearing before the Supreme Court might be saved in case their Lordships should think that an appeal lay to that Court from the High Court of Ontario.

The case has been very fully and ably argued. It presents two questions of some difficulty:

(1.) To what Court or Courts in Ontario does an appeal lie from an award under the Canada Railway Act, 1903 ?

(2.) If an appeal to the High Court of Ontario is competent, does an appeal to that Court preclude an appeal to the Supreme Court of Canada ?

By s. 168 of the Railway Act, 1903, " whenever the award exceeds $600 " an appeal is given " upon any question of law or fact to a superior Court." What is a superior Court? The expression has a different meaning in different provinces. In the General Interpretation Act, R. S. C., 1906, c. 1, s. 34 (26.), superior Court is defined to mean " in the province of Ontario

J. C. 1909

JAMES BAY RAILWAY v. ARMSTRONG.

the Court of Appeal for Ontario and the High Court of Justice for Ontario." It seems to follow that a party desirous of appealing from an award under the Canada Railway Act has in Ontario the option of going either to the High Court or to the Court of Appeal. This has uniformly been so held in Ontario, and it has also been held from the first that no appeal lies from the High Court to the Court of Appeal in Ontario in the case of railway awards: see *Birely* v. *Toronto, Hamilton, and Buffalo Ry. Co.* (1)

The Supreme Court in the present case appear to think that this view is right. It is, however, objected that, if the appellant has the option of going either to the High Court or the Court of Appeal, and if the Supreme Court is right in holding that no appeal lies from the High Court to the Supreme Court, an appellant has the power of shutting out any further appeal at his own will and pleasure. No doubt that privilege, whether it be a benefit to the litigants or a calamity, is somewhat anomalous, but it does not seem to their Lordships that the anomaly is so great or so startling as to make it necessary or permissible to confine the expression "superior Court" to the Court of Appeal. In Ontario, when the right of appeal from railway awards was first given, the appeal "upon any question of law or fact" lay "to a judge of any of the superior Courts of Law or Equity": 38 Vict. c. 15, s. 4 (Ontario), entitled "An Act respecting Railway Arbitrations." Under that Act of course there could be no further appeal, and it may perhaps be doubted whether the unlimited right of appeal which now seems to be authorized generally has not gained admittance to the enactment by some oversight or inadvertence.

The other question is more difficult. The Supreme and Exchequer Courts Act, R. S. C., 1886, c. 135, s. 26, provides that, with an exception which does not apply to the present case, "no appeal shall lie to the Supreme Court but from the highest Court of last resort having jurisdiction in the province in which the . . . . matter or other judicial proceeding was originally instituted, whether the . . . . matter or other judicial proceeding was or was not a proper subject of appeal to

(1) 25 Ont. App. Rep. 88.

such highest Court of last resort." Now, unquestionably the Court of Appeal in Ontario is the highest Court of last resort having jurisdiction in the province. The High Court is not. It was argued that in this particular case the High Court becomes "the highest Court of last resort" when no appeal lies from it to the Court of Appeal, and it is placed by statute for the purpose in hand on an equal footing with the Court of Appeal. But their Lordships think that that result cannot be attained without unduly straining the words of the statute, and that, except in certain specified cases within which the present case does not come, an appeal to the Supreme Court lies only from the Court of Appeal.

There remains for consideration the judgment of the High Court from which special leave to appeal was granted.

It appears from the judgment of Meredith C.J. that the case was discussed before the arbitrators under four distinct heads. The award of the arbitrators in the majority does not give any indication of the way in which these several heads were dealt with or any clue to the reasons on which the award was based. The very guarded answer which the two arbitrators gave to the statement of the dissentient arbitrator, the fact that, when the learned Chief Justice expressed his willingness to receive an explanation from them, they abstained from giving him any assistance, and the line of argument adopted on behalf of the railway company, all lead to the inference that these arbitrators were under the impression that they could prevent or nullify an appeal by giving merely a general verdict. It was argued at the Bar that the judge on appeal ought not to have disturbed the finding of the arbitrators unless it was demonstrable that the award was founded on some error in principle. But how is an error in principle to be detected when there is nothing to shew what the principles were by which the tribunal was guided? The statute gives a right to an appeal. That right was surely intended to be effective. It is impossible to suppose that the arbitrators from whom the appeal lies can defeat that right by judicious silence. Such conduct rather tends to provoke an appeal. After all it only makes the task of the judge on appeal a little more troublesome. It throws upon him the duty of going through

J. C. 1909

JAMES BAY RAILWAY v. ARMSTRONG.

all the evidence and examining into the justice of the award, paying, of course, due regard to the finding of the arbitrators. That is what the learned Chief Justice has done. He seems to have considered the evidence most carefully, and he came to the conclusion that the sum awarded was not adequate. There is no ground for disturbing his judgment, which is quite in accordance with the view expressed in *Atlantic and North-West Ry. Co.* v. *Wood.* (1)

Their Lordships concur with the Chief Justice in regretting the enormous expense incurred in this case in settling a very simple question, and they share the hope that it may be found possible to devise some better way of ascertaining the compensation payable to a landowner whose property is taken by a railway company under their statutory powers.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellants, in accordance with their undertaking, will pay the costs of the appeal as between solicitor and client.

Solicitors for appellants: *Linklater, Addison & Brown.*
Solicitors for respondent: *Tomlin & Chitty.*

(1) [1895] A. C. 257.

[PRIVY COUNCIL.]

MINISTER OF STAMPS . . . . . APPELLANT; J. C.*

AND 1909

ANNIE QUAYLE TOWNEND . . . . . RESPONDENT. *July* 22, 23.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW ZEALAND.

New Zealand Deceased Persons' Estates Duties Act, 1881, *s.* 35—*Stamp Acts—Verbal Gift to Holder of a Power of Attorney—Deeds of Gift—Disposition of Property to evade Taxation.*

The testator some years before his death executed a power of attorney in favour of his daughter, the respondent, and by a verbal gift, in order to escape taxation, authorized her to appropriate the purchase-moneys received thereunder of lands sold by him and of mortgage moneys due to him, to relend the latter to the mortgagors in her own name, and generally to invest his moneys in her own name :—

Held, that the gift to the respondent being verbal could not be stamped ; that the deeds executed in carrying out the transaction of gift were not deeds of gift within the meaning of the New Zealand Stamp Acts, and did not operate a disposition of property within the meaning of s. 35 of New Zealand Deceased Persons' Estates Duties Act, 1881.

APPEAL from a judgment of the Court of Appeal (March 30, 1908) on a case and petition removed from the Supreme Court of New Zealand (Canterbury district).

The effect of the judgment was (1.) to allow the respondent's appeal from an assessment by the Minister of Stamps of duty on the estate of George Henry Moore, deceased, on the ground that there had wrongly been included therein certain properties and assets of the value of 432,222*l.* 0*s.* 4*d.* which had come into the possession of the respondent between the month of October, 1900, and the death of the said George Henry Moore on July 7, 1905, and (2.) to dismiss the appellant's petition whereby he claimed duty on the said sum of 432,222*l.* 0*s.* 4*d.* upon one of three alternative grounds.

Those grounds were (1.) that the said assets were in fact the property of the testator and not the property of the respondent;

* *Present :* LORD LOREBURN L.C., LORD ASHBOURNE, LORD COLLINS LORD GORELL, and SIR ARTHUR WILSON.

J. C. 1909 — MINISTER OF STAMPS v. TOWNEND.

(2.) that the transactions whereby the respondent acquired the said assets were dispositions of property "made for the purpose of evading the duty imposed by" the Deceased Persons' Estates Duties Act, No. 41, 1881, within the meaning of s. 35 of that Act; (3.) that the said transactions or dispositions were liable to duty as being "deeds of gift or the subject of deeds of gift."

The undisputed facts were that the testator gave to the respondent on December 13, 1893, a power of attorney, under which she thenceforth acted, by means whereof she from time to time possessed herself of property belonging to him to the said amount of 432,222*l.* 0*s.* 4*d.* in the following ways:—

(*a*) Sales were from time to time effected by the respondent of portions of the testator's Glenmark estate, and any purchase-moneys which were paid in cash were paid into her own banking account, and in cases where it had been arranged that part of the purchase-money should remain on mortgage the mortgages were taken in her name.

(*b*) Mortgages held by the testator in his own name were released by the respondent, and new mortgages taken in her own name.

(*c*) Moneys were drawn by the respondent out of the testator's banking account and applied in making investments in her own name.

It further appeared that although the testator was aware generally that property belonging to him was being placed in the name of the respondent, she did not obtain his consent to each individual transaction. Avoidance of duty was admitted by the respondent to have been the object of the transactions.

The respondent, acting under s. 55 of the New Zealand Stamp Act, No. 16, 1882, paid 34,307*l.*, the amount of duty assessed by the appellant, and required him to state a case for the opinion of the Supreme Court. He did so, submitting the questions whether the assessment was legally valid; if not, on what amount duty should be assessed, and what refund, if any, should be made. He also presented a petition to the Supreme Court for a declaration that the property which he had assessed remained the property of the testator, and that the said transactions were dispositions for the purpose of evading the duty imposed by the Deceased Persons' Estates Duties Act, 1881.

Sect. 35 of that Act is as follows: "It shall be lawful for any Court of competent jurisdiction, on the application of the Commissioner, to declare any disposition of real or personal property to have been made for the purpose of evading the duty imposed by this Act and also to declare that duty is payable on the property comprised in such disposition and to order that some person shall file a statement in respect of such property and pay duty thereon, and thereafter all the provisions of this Act shall be applicable to such case as if such person were an administrator under this Act and the said disposition the administration under which he takes the property comprised therein."

By s. 7 of the Stamp Acts Amendment Act, No. 30, 1891, the expressions "deed of gift" and "donor" are defined as follows: "'Deed of gift' shall mean and include every deed of gift or instrument by way of gift transferring or purporting to transfer property absolutely and every conveyance transfer or other disposition of property containing trusts or dispositions to take effect during the life of the donor and not being made before and in consideration of the marriage of the donor or in favour of a bona fide purchaser or encumbrancer for valuable consideration in money and whether or not the property comprised in such deed is subject to any limitation.

"'Donor' means the person making any deed of gift."

By s. 6, sub-s. 1, of the Stamp Act Amendment Act, No. 67, 1895, the above definition of "deed of gift" is altered as follows: "In order to prevent the avoidance or evasion of duties by family arrangements or otherwise the definition of 'deed of gift' in section seven of the Stamp Acts Amendment Act 1891 is hereby extended to include every deed or instrument whereby any person directly or indirectly conveys tranfers or otherwise disposes of property to or for the benefit of any person connected with him by blood or marriage in consideration or with the reservation of any benefit or advantage to or in favour of himself or any other person whether by way of rent-charge or life or any other estate or interest in the same or any other property or by way of annuity or other payment or otherwise howsoever and whether such benefit or advantage is charged on

J. C. 1909 — MINISTER OF STAMPS v. TOWNEND.

the property comprised in such deed or instrument or not and in assessing the duties payable in respect of such property no deduction shall be made in respect of such benefit or advantage."

And by sub-s. 2 (*a*) of the same section it is enacted as follows: "There shall be payable in respect of any property comprised in any deed of gift the same duties as would be payable under the Deceased Persons' Estates Duties Act 1881 in respect of a devise or bequest of such property by the donor as testator to the donee as devisee or legatee."

The Court of Appeal (Chapman J. dissenting) allowed the respondent's appeal from the assessment and dismissed the appellant's petition. All the judges held that the transactions did not come within s. 35 as evasion of duty or within the provisions of the Stamp Acts as deeds of gift. With regard to s. 35 set out above, Stout C.J. observed that it was clear from the decision in *Payne* v. *Rex* (1) "that if the gifts were complete and real, the mere fact that the donor and the donee wished to avoid the payment of the duty will not bring such a transaction within s. 35. The donor, the deceased testator, meant to give his money and his property to his daughter, and he also meant to avoid payment of death duties. His transactions were real, they were not colourable if the gifts were complete." On the evidence he found that they were real and held "that, following the decision of the Privy Council in *Payne* v. *Rex* (1), this Court cannot hold that any duty became payable under s. 35."

Danckwerts, K.C., *Bell, K.C.*, and *Northcote*, for the appellant, contended that the assets in question remained the property of the testator at the time of his death. The respondent's evidence had not established with regard to each alleged gift that the testator intended to make and did make a completed gift to her. Chapman J.'s judgment on this point was relied upon. The respondent was in a fiduciary position towards the testator. The transactions were not real dispositions in her favour and were made for the purpose of evading duty within the meaning of s. 35 of the Act of 1881. So far as they consisted of the taking of mortgages in the respondent's name, either in

(1) [1902] A. C. 552.

substitution for mortgages held by the testator or as security for purchase-moneys payable to him, it was contended that the same were carried out by written instruments, that by means of such instruments a gift (if any) to the respondent was effected, and that they were accordingly liable to duty as deeds of gift. They referred to the above Act of 1881, No. 41, ss. 1, 5—9, 22—25, 34—37; its amendment Act of 1885, No. 21, ss. 1, 9—15; the Stamp Act, 1882; the Stamp Acts Amendment Act, 1891, No. 30, ss. 7—10; its further amending Act, 1895, No. 67, s. 6; and to the following cases: *Simms* v. *Registrar of Probate* (1); *Payne* v. *Rex* (2); *Bullivant* v. *Attorney-General for Victoria* (3); *Shower* v. *Pilck* (4); *In re Chambers* (5); *In re Fleming to Macmillan* (6); *Hannah* v. *Commissioner of Stamps* (7); *Williams* v. *Commissioner of Stamps* (8); *Lunn* v. *Thornton* (9); *Holroyd* v. *Marshall* (10); *Milroy* v. *Lord* (11); *Attorney-General* v. *Worrall.* (12)

Buckmaster, K.C., and *Sargant,* for the respondent, contended that the evidence established the testator's desire to transfer his property to the respondent in his lifetime and also a specific direction to the respondent to place to her credit and appropriate all his moneys coming to her hands under his power of attorney. The respondent complied with this direction, and her doing so completed the transfer and made the moneys and investments her absolute property by way of gift, freed from all liability to account to the testator. The respondent did not receive them under any disposition made for the purpose of evading duty within the meaning of s. 35 of the Act of 1881. That section strikes at colourable transactions. These were real and genuine gifts made to evade the liability resulting from the application of taxing Acts, but not to evade the discharge of any legal obligation already incurred. In that view they were not illegitimate. Sect. 7 of the Stamp Act of 1891 as amended by s. 6 of the Act of 1895 taxes instruments and not transactions,

(1) [1900] A. C. 323.
(2) [1902] A. C. 552.
(3) [1901] A. C. 196.
(4) (1849) 4 Ex. 478.
(5) (1894) 13 N. Z. L. R. 111.
(6) (1899) 18 N. Z. L. R. 689.
(7) (1902) 21 N. Z. L. R. 409.
(8) (1904) 24 N. Z. L. R. 658.
(9) (1845) 1 C. B. 379.
(10) (1862) 10 H. L. C. 191.
(11) (1862) 4 D. F. & J. 264.
(12) [1895] 1 Q. B. 99.

J. C. 1909 — MINISTER OF STAMPS v. TOWNEND. — 1909 — *July* 23.

and there was not in this case any instrument or deed of gift taxable thereunder.

Bell, K.C., in reply.

The judgment of their Lordships was delivered by

LORD LOREBURN L.C. This case has been admirably argued on both sides. There are only two questions in dispute, on both of which the judgments given by the Court of Appeal of New Zealand are so clear and so exhaustive that it is not necessary for their Lordships to say much.

The first question is whether or not the deceased, George Henry Moore, intended to give, and did effectively give, to his daughter large sums of money during the later years of his life. While admitting that a Court must carefully scrutinize any claims by the living that they have received gifts at the hands of those who are no longer able to give an account of themselves, their Lordships are satisfied that the conclusion arrived at by the Court of Appeal in this case was perfectly sound. The deceased, in their Lordships' opinion, deliberately intended to part with as much of his property as he safely could in favour of his daughter, in order to escape payment of taxes either during his life or after his death. His conduct in admittedly allowing his own money to be paid to his daughter, and the evidence of Mr. Martin, corroborate in the strongest way the evidence of the daughter, which of itself seems to their Lordships to be abundantly sufficient in every respect to shew that it is a probable and credible account of what happened. Their Lordships have not overlooked the cogent observations of Chapman J., but they think the real answer to them is that this evidence has to be taken as a whole, and that when there is a substantial corroboration of the testimony given by the interested party it confirms the credit not only of the statements which are expressly supported, but of all statements made by the interested party. If this be so, the evidence given by Mrs. Townend is conclusive in regard to the case.

The second question is whether or not certain deeds fall within the duty chargeable upon deeds of gift. The type of document in question is as follows: A mortgagor owing money to Mr.

Moore pays it to his daughter, with his consent, and she relends the money to the same mortgagor. This transaction, although carried out by two deeds, is carried out by deeds which do not themselves convey anything to the daughter. What does convey something to her is the authority emanating from Mr. Moore that his daughter might have for herself moneys received by her under his power of attorney, and this authority, being verbal, could not be stamped. The learned Chief Justice puts it in the most concise way when he says that the statute taxes instruments and does not tax transactions. Here there was no gift by any document, and therefore there is no duty payable. Their Lordships agree with the observation made by the learned Chief Justice in regard to the 35th section of the Deceased Persons' Estates Duties Act, 1881.

Accordingly their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal, but only one set of costs will be allowed.

Solicitors for appellant: *Mackrell, Maton, Godlee & Quincey.*
Solicitors for respondent: *Hollams, Sons, Coward & Hawksley.*

Dictum of LORD DUNEDIN at p. 646, *applied.* PHILCO RADIO, ETC., LTD. *v.* J. SPURLING, LTD. [1949] 2 All E.R. 129.

Applied. PHILCO RADIO AND TELEVISION CORPN. OF G. B., LTD. *v.* J. SPURLING, LTD. [1949] 2 All E.R. 882.

[PRIVY COUNCIL.]

J. C.* 1909

July 8, 9, 30.

DOMINION NATURAL GAS COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

(1.) COLLINS; (2.) PERKINS AND OTHERS . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Article of Dangerous Nature—Contractor—Misfeasance.

In actions for damages in respect of an accident against the appellant gas company it appeared that the appellants were not occupiers of the premises on which the accident had occurred and had no contractual relations with the plaintiffs, but that they had installed a machine on the said premises, and the jury found that the accident was caused by an explosion resulting from gas emitted, owing to the appellants' negligence, through its safety valve direct into the closed premises instead of into the open air:—

Held, that the initial negligence having been found against the appellants in respect of an easy and reasonable precaution which they were bound to have taken, they were liable unless they could shew that the true cause of the accident was the act of a subsequent conscious volition, e.g., the tampering with the machine by third parties.

APPEALS, in the latter case being by special leave, from a judgment of the Court of Appeal (December 31, 1908) affirming judgments of Falconbridge C.J. for the payment of damages by the appellants (1.) to the respondent Collins; (2.) to the respondents the widow and children of Perkins, deceased.

The actions, though not consolidated, were tried together, and the damages were decreed against the appellants and also their co-defendants, the Toronto, Hamilton, and Buffalo Railway Company. Both companies appealed. The appeal by the railway company was allowed and the actions dismissed as against them; the appeal by the gas company was dismissed.

At the time of the accident Perkins was employed as a night workman by the railway company in their machine shops in which the accident occurred. The appellants had installed a

* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD COLLINS, and SIR ARTHUR WILSON.

gas apparatus and were supplying natural gas in the said machine shops under an agreement with the railway company. The appellants installed inside the blacksmith shop of the railway company a regulator for the purpose of controlling the pressure of the natural gas, which regulator, it was contended, should have been placed outside the building, and a pipe should have been connected from the brass safety valve attached to the regulator to the outside of the building, to permit the gas which might proceed from the safety valve to escape to the outside atmosphere instead of remaining inside the building, where the gas was lighted and burning under a boiler all night. Between 1 and 2 o'clock in the morning of November 1, 1906, a large quantity of gas escaped through the said brass safety valve in the said blacksmith shop. Perkins and Collins went to the blacksmith shop to turn it off, when an explosion occurred with the results complained of.

The jury, whose specific findings are stated in their Lordships' judgment, found that the accident was caused by the escape of gas from the brass safety valve, and that the appellants were guilty of negligence in not running a pipe therefrom up through the roof of the building.

Sir R. Finlay, K.C., and *Lynch-Staunton, K.C.*, for the appellants, contended that there was no evidence of negligence by them which should properly have been submitted to the jury. The apparatus was installed under the direction and supervision of the railway company, and the appellants were bound by contract to install it in whatever way the railway company directed. It was completed to the satisfaction of the chief engineer of the railway company. It was accepted by the railway company with the full knowledge of the defect (if any) which is now complained of. Under those circumstances the railway company could not be heard to complain of the machinery so installed or of any resulting accident, and their employees did not stand in any higher position. The evidence shewed that it was the duty of the railway company to keep the apparatus clean and that they failed to do so. They allowed the regulator to become dirty, the effect of which was to cause a greater quantity

J. C. 1909

DOMINION NATURAL GAS COMPANY, LIMITED v. COLLINS AND PERKINS.

of gas to be transmitted from the high-pressure side to the low-pressure side of the regulator and thereby force a greater quantity of gas through the safety valve into the building than would have been the case if the apparatus had been kept clean. Their servants tampered with the apparatus and even hammered the valve. It was contended that *Parry* v. *Smith* (1), relied upon by the Court below, did not govern this case. *Earl* v. *Lubbock* (2) was referred to, and it was contended that the principles there laid down exculpated the appellants from any legal liability to the respondents. Reference was also made to *Lax* v. *Corporation of Darlington* (3); *Rapson* v. *Cubitt* (4); *Cunnington* v. *Great Northern Ry. Co.* (5); Clerk and Lindsell on Torts, 4th ed., p. 475.

D'Arcy Martin, K.C., for the Perkins respondents, contended that the judgment appealed from was right. The injuries sustained were caused by the appellants not running a pipe from the safety valve up through the roof. The jury rightly found that this was negligence. The appellants had control of a gas of a highly explosive and dangerous character, and it was their duty, not merely to their employees but to third parties, to take more than ordinary care that it should not escape into closed rooms instead of into the open air. They also owed a statutory duty to the respondents under R. S. O., 1897, c. 199, s. 27, c. 200, s. 4. Reference was made to *Paterson* v. *Mayor, &c., of Blackburn* (6); *Cunnington* v. *Great Northern Ry. Co.* (5); *Burrows* v. *March Gas and Coke Co.* (7)

Farmer, for the respondent Collins, also contended that the jury had found the appellants guilty of negligence and had absolved the respondents from contributory negligence. The appellants were bound to take precautions, easy and obvious in their nature, to prevent a highly explosive and dangerous substance from escaping into closed rooms, and they did not do so.

Lynch-Staunton, K.C., in reply.

(1) (1879) 4 C. P. D. 325.
(2) [1905] 1 K. B. 253.
(3) (1879) 5 Ex. D. 28.
(4) (1842) 9 M. & W. 710.
(5) (1883) 49 L. T. (N.S.) 392.
(6) (1892) 9 Times L. R. 55.
(7) (1872) L. R. 7 Ex. 96.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The defendants the Dominion Natural Gas Company recover natural gas from certain gas-bearing strata situated at a considerable depth below the surface of the ground and distribute this gas as a commercial product. In order to obtain a way-leave for their main, they entered into a contract with the defendants the Toronto, Hamilton, and Buffalo Railway Company, of which one of the terms was that they should supply the railway company with gas at reduced rates at certain buildings belonging to the railway company, and should furnish meters and regulators for the gas so supplied. The railway company wished to have a supply, and the gas company installed a supply plant for the purpose at the repair shops of the railway company in the city of Hamilton. The gas, as it issues from the ground, is at a very high pressure. This pressure is reduced by a transforming device before the gas is admitted to the mains. But the pressure in the mains is still too high for actual working, and it is therefore necessary still further to reduce the pressure before the gas is admitted to the burning jets, the ultimate pressure desirable being that of a few ounces, whereas the pressure in the mains is reckoned in pounds. This is effectuated by means of a very simple and ingenious regulator. This may be described as follows. The gas from the service pipe is admitted into a chamber with an exit at the other side, and this chamber can be closed against the passage of the gas by means of a door working after the fashion of a portcullis. On the exit side the pipe branches, one branch, the direct one, going to the burners, the other, which forms part of the regulator, being taken vertically upwards and then bent back so as to fill a chamber situate vertically immediately above the portcullis. This chamber is divided into two parts horizontally by a diaphragm of indiarubber arranged on a metal frame. The lower surface of the diaphragm connects with a piston rod, which is free to move up and down and is attached at the lower end to the top of the portcullis door. In the side of the piston rod, about the middle, there is a slot into which is inserted the end of a lever supported on a fixed fulcrum. On the other end of the lever is a sliding weight, so that, by receding the weight from or approaching it

J. C. 1909

DOMINION NATURAL GAS COMPANY, LIMITED v. COLLINS AND PERKINS.

to the fulcrum, the upward pressure of the end of the lever which is in the slot can be increased or diminished. The apparatus then works as follows. The weight on the lever, which of course tends to keep the portcullis door open, is adjusted at the number of ounces pressure required. The portcullis door being open, the gas is admitted at the high pressure. The moment, however, it has passed through the chamber, it goes not only to the burners, but also up the vertical pipe, and gains admission to the top of the diaphragm. Its pressure being greater than is necessary to overcome the upward pressure effected by the lever and weight, it depresses the diaphragm and the piston rod, and gradually shuts the portcullis, till the opening becomes so small that the pressure of the system is reduced and equalizes itself. Inasmuch, however, as at the first moment of admission there may be a strong rush of gas before the regulator action has time to work, and also in order to provide for any sticking of the portcullis, there is an extra precaution employed by means of a safety valve inserted at the angle where the vertical pipe turns backwards towards the diaphragm chamber. The valve is a simple weight valve, the pressure being of course calculated at a little greater than the working pressure of the system.

Now the gas company installed this system in the blacksmith's shop, an enclosed chamber. It seems to be usual, and is obviously conducive to safety, to put a pipe on the emission nozzle of the safety valve and take the outlet of the pipe to the open air. The company, however, did not do so, but simply allowed the emission nozzle of the safety valve to discharge, when it acted, into the air of the chamber.

The whole system was installed and worked, so far as is known, well for upwards of a year. It was from time to time inspected by the workmen of the gas company.

On November 1, 1906, the plaintiff Collins and the deceased Perkins, whose representatives are the other plaintiffs, being workmen of the railway company, and having charge of the boilers which are heated by the gas, found that the gas was not coming easily to the boilers. They went into the chamber and found there had been some escape of gas. They then went away,

but shortly afterwards returned. This time, on opening the door, or a few seconds after, they were met with a rush of gas; the gas caught fire from the jets of the boilers. There was an explosion, and Perkins was killed and Collins injured.

In the circumstances the plaintiffs sued both the railway company and the gas company for damages. The railway company deny liability on the ground that there was no negligence on their part. They had employed capable persons in the gas company to install the machine, and if there was any fault in the system it was the gas company who were to blame. The gas company denied liability on the ground that the system as installed was proper and safe, and that the escape which took place must have been due to improper practices on the part of the railway company's servants for which they were not responsible.

The machine itself was examined, and it was found that there was an accumulation of dirt which prevented the portcullis door closing tight. It was also proved that the railway company's servants had inserted a tap valve with a controlling cock in the pipe just before it enters the regulator, i.e., on the high-pressure side; also that some workers of the railway company, annoyed by the noise which it made, had put a punch on top of the safety valve and hammered it.

In this state of matters the learned judge at the trial put certain specific questions to the jury, which, with the answers, were as follows:

1. Was the injury to the plaintiff Collins and to Perkins caused by any negligence of the defendants the railway company?—A. Yes.

2. If so, wherein did such negligence consist?—A. By the company allowing their men to tamper with the gas plant.

3. Was the injury to the plaintiff Collins and to Perkins caused by any negligence of the defendants the gas company?—A. Yes.

4. If so, wherein did such negligence consist?—A. By not running a pipe up through the roof.

5. If you find the accident was caused by the escape of gas, from which valve do you find the gas escaped?—A. Safety valve.

J. C.
1909
DOMINION NATURAL GAS COMPANY, LIMITED v. COLLINS AND PERKINS.

They also, by their answers to certain other questions (which it is unnecessary to quote), negatived contributory negligence. Upon these answers the trial judge found for the plaintiffs against the gas company, but dismissed the suit as against the railway company.

The gas company appealed, and the plaintiffs resisted the appeals, but acquiesced in the decision absolving the railway company.

The Appeal Court affirmed the judgment of the trial judge in each case, and the present appeals are against these judgments.

To come now to the position of the gas company. The gas company were not occupiers of the premises on which the accident happened. Further, there being no relation of contract between the company and the plaintiffs, the plaintiffs cannot appeal to any defect in the machine supplied by the defendants which might constitute breach of contract. There may be, however, in the case of any one performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (1), *Thomas* v. *Winchester* (2), and *Parry* v. *Smith* (3) are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable.

(1) (1816) 5 M. & S. 198. (2) (1852) 6 N. Y. R. 397.
(3) 4 C. P. D. 325.

For against such conscious act of volition no precaution can really avail.

In applying these principles to the facts in hand the basis of consideration must be sought in the findings of the jury, unless it can be said of these findings that they are incapable of support by the evidence.

Now the jury has affirmed negligence on the part of the gas company in respect that they installed the safety valve with an emission direct into the shop instead of into the open air. This finding seems to their Lordships not only capable of support upon the evidence, but really reasonable in itself. For the safety valve by its very existence was meant to work from time to time; and the frequency of its working would seem to depend on causes which might be quite independent of negligence, e.g., sudden pressure of gas, and also accumulations of dirt which would prevent the portcullis closing tight. When the valve did work, gas was necessarily emitted, and it would seem both an easy and a reasonable precaution that that emission should be led to the open air, where it would be harmless, rather than put into the closed chamber, where it might become a source of danger.

That being so, have the defendants been able to shew affirmatively that the true cause of the accident was the conscious act of another volition, i.e., the tampering with the machines by the railway company's workmen?

In truth, their Lordships think that on the evidence the true cause of the escape is left in doubt. It is found by the jury, and their Lordships think rightly, that it took place at the safety valve, and not at the valve put in by the railway company's workmen on the high-pressure side. But the escape at the safety valve itself could equally have been caused either (1.) by the destruction of the valve as a tight-fitting valve owing to the hammering, or, in other words, by the negligence of the railway company's workmen; or (2.) by the fact that the portcullis had got clogged with dirt, which, by preventing it from shutting, would allow of a constant pressure greater than the restraining power of the safety valve. Now there is no evidence to shew that the accumulation of dirt was due to the action of the railway

J. C. 1909

DOMINION NATURAL GAS COMPANY, LIMITED v. COLLINS AND PERKINS.

company's workmen. It was indeed suggested that in putting in the tap valve they may have broken a wire gauze screen which was found with a hole in it, and which is meant to protect the portcullis chamber from dirt. But, first, this is only a suggestion unsupported by actual testimony, and, second, it is certain that it is only a question of time, the gauze screen being unable to prevent a certain amount of dirt gaining admission, and the dirty state of the portcullis chamber being either a natural result to protect against which the safety valve was in one aspect designed, or the result of the negligence of the gas company's servants, whose duty it was from time to time to inspect the apparatus and see that it was in good order.

Accordingly their Lordships hold that the defendants the gas company have failed to shew that the proximate cause of the accident was the act of a subsequent conscious volition, and that, there being initial negligence found against them, the plaintiffs are entitled to recover.

Their Lordships will therefore humbly advise His Majesty to dismiss these appeals and to affirm the judgments of the Court of Appeal.

The appellants will pay one set of the respondents' costs of the appeals, but the taxing officer will allow such additional items (if any) as are in his opinion justified by the circumstances of the case.

Solicitors for appellants: *Harrison & Powell.*

Solicitor for both sets of respondents: *R. A. Daniell.*

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1st, 1909, will be as follows:—

In the First Series,
[1909] 1 Ch. [1909] 2 Ch.

In the Second Series,
[1909] 1 K. B. [1909] 2 K. B. [1909] P.

In the Third Series,
[1909] A. C.

INDEX.

"ACCELERATION"—Of succession—Propulsion of fee—Succession duty - - 166
See REVENUE. 6.

ACCIDENT—Insurance.
See under INSURANCE (ACCIDENT).

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

ACCUMULATIONS—Will—Testator's children to take equal shares in the residue at majority—Accumulations of income during minority of donee - - 570
See PRIVY COUNCIL APPEALS. 8.

"ACTIO PERSONALIS MORITUR CUM PERSONA" - - - - - - 383
See EMPLOYER AND WORKMAN. 2.

ACTION—Malicious prosecution, Action for—Onus probandi—Law of Ceylon - 549
See PRIVY COUNCIL APPEALS. 12.

ADMIRALTY.
See under SHIPPING.

ADULTERY—Marriage of adulterers—Illegitimacy of children procreated in adultery—Appeal from Ceylon - - - 376
See PRIVY COUNCIL APPEALS. 13.

AGENT—Principal and agent.
See under PRINCIPAL AND AGENT.

—— Will—Reduction—Agent alleged to benefit under will prepared by him—Suspicion—Defect in attestation - - 278
See SCOTTISH LAW. 4.

APPEAL—Australian Commonwealth Constitution Act, 1900—Practice—Special leave to appeal - - - - - - 345
See PRIVY COUNCIL APPEALS. 1.

—— Canada Railway Act—Appeal from an award to High Court—Further appeal to Supreme Court incompetent - 624
See PRIVY COUNCIL APPEALS. 5.

APPEAL—*continued.*

—— Poor rate—Notice of appeal—Notice to assessment committee—Entry and respite of appeal - - - 247
See RATES. 1.

—— Workmen's Compensation Act, 1906—Practice—Competency - - 523
See EMPLOYER AND WORKMAN. 5.

APPOINTMENT—Power of.
See under POWER OF APPOINTMENT.

APPROACHES—"Bridge"—Public carriage road carried over railway—Width of bridge—Liability of railway company - 253
See RAILWAY. 1.

ARTICLES OF ASSOCIATION—Company.
See under COMPANY.

ASSESSMENT—Rates.
See under RATES.

ASSIGNEE—Deposit by purchaser to guarantee fulfilment of contract—Default by purchaser or his assignee—Action to recover deposit dismissed - - - 576
See PRIVY COUNCIL APPEALS. 6.

ASSURANCE.
See under INSURANCE.

ATTESTATION—Will—Reduction—Agent alleged to benefit under will prepared by him—Suspicion—Defect in attestation - - - - - - 278
See SCOTTISH LAW. 4.

ATTORNEY—Power of.
See under POWER OF ATTORNEY.

AUSTRALIA—Laws of.
See PRIVY COUNCIL APPEALS. 1.

BENEFICE—Income tax—Incumbent of benefice—Easter offerings - - - 104
See REVENUE. 2.

BILL OF LADING—Shipping.
See under SHIPPING.

BILL OF SALE — *Carriers' Lien — Agreement giving Credit to Trader for Carriage of Goods subject to Preservation of Lien—Goods on Land in Tenancy of Trader—Detainer of Goods—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4.

A railway company by a "ledger agreement" opened a credit account with a coal merchant for the carriage of his coal, the company to have a continual lien upon the coal conveyed on their lines or being at any time on ground rented of the company for all charges due to them, and to be at liberty to sell and dispose of any of the coal to satisfy the lien, with the right to close the account by giving one day's notice. By separate agreements the company let to the merchant allotments within the railway yard for the purpose only of stacking and dealing with the coal. The company had the keys of the yard gates and kept them locked at certain times. The payments being in arrear, the company closed the account, locked the gates, and detained the coal:—

Held by Lord Loreburn L.C. and Lords Macnaghten and Atkinson (Lords Robertson and Collins dissenting), that the inference of fact from the circumstances was that both parties intended the company's right of detainer to be preserved and if necessary enforced against the coal while in the railway yard; that the ledger agreement conferred no licence to take possession of personal chattels or charge or equity thereon and was not a bill of sale within the Bills of Sale Acts; and that the trustee in the merchant's bankruptcy had no claim against the company in respect of the detainer.

Decision of the Court of Appeal on the above point, [1908] 2 K. B. 54, reversed, and decision of Phillimore J., [1908] 1 K. B. 195, thereon restored. GREAT EASTERN RAILWAY COMPANY *v.* LORD'S TRUSTEE - **H. L. (E.) 109**

BREACH OF CONTRACT.
See under CONTRACT.

BRIDGE — Approaches — Public carriage road carried over railway—Width of bridge —Liability of railway company - **253**
See RAILWAY. 1.

—— Bridge carrying public highway over railway —Liability to maintain road - **138**
See SCOTTISH LAW. 3.

CALEDONIAN RAILWAY (ADDITIONAL POWERS) ACT, 1872 - - - **138**
See SCOTTISH LAW. 3.

CANADA—Laws of.
See PRIVY COUNCIL APPEALS. 2—10.

CAPE OF GOOD HOPE—Laws of.
See PRIVY COUNCIL APPEALS. 11.

CARRIER—Bill of sale — Carriers' lien—Goods on land in tenancy of trader—Detainer of goods - - - - - - **109**
See BILL OF SALE.

CASES:—

—— *Anslow* v. *Cannock Chase Colliery Co.*, [1909] 1 K. B. 352.
Affirmed by H. L. (E.)
[1909] **A. C. 435**

—— *Attorney-General* v. *Richmond and Gordon* (*Duke of*), [1908] 2 K. B. 729.
Affirmed by H. L. (E.)
[1909] **A. C. 466**

—— *Blackpool and Fleetwood Tramroad Co.* v. *Thornton Urban Council*, [1907] 1 K. B. 568.
Affirmed by H. L. (E.) *sub nom.* THORNTON URBAN COUNCIL *v.* BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY
[1909] **A. C. 264**

—— *Brook* v. *Meltham Urban District Council*, [1908] 2 K. B. 780.
Affirmed by H. L. (E.)
[1909] **A. C. 438**

—— *Buchan* (*Earl of*) v. *Lord Advocate*, (1907) S. C. 849.
Affirmed by H. L. (Sc.)
[1909] **A. C. 166**

—— *Caledonian Ry. Co.* v. *Glasgow* (*City of*) *Corporation*, (1906) 8 F. 755; (1908) S. C. 244.
Affirmed by H. L. (Sc.)
[1909] **A. C. 138**

—— *Conway* v. *Wade* - [1908] 2 K. B. 844, 848
Reversed by H. L. (E.)
[1909] **A. C. 506**

—— *Cooke* v. *Midland Great Western Railway of Ireland*, [1908] 2 I. R. 242.
Reversed by H. L. (I.)
[1909] **A. C. 229**

—— *Cooper* v. *Blakiston* - [1907] 2 K. B. 688
Affirmed by H. L. (E.) *sub nom.* BLAKISTON *v.* COOPER
[1909] **A. C. 104**

—— *Darlington* v. *Roscoe & Sons*, [1907] 1 K. B. 219.
Approved by H. L. (Sc.). UNITED COLLIERIES, LIMITED *v.* SIMPSON
[1909] **A. C. 383**

—— *Dewar* v. *Goodman* - [1908] 1 K. B. 94
Affirmed by H. L. (E.) [1909] **A. C. 72**

—— *Forrest* v. *Merry & Cuninghame, Ld.*, (1908) 45 Sc. L. R. 290.
Reversed by H. L. (Sc.)
[1909] **A. C. 417**

—— *Forster* v. *Elvet Colliery Co. Quin* v. *the Same. Seed* v. *the Same. Morgan* v. *the Same*, [1908] 1 K. B. 629.
Affirmed by H. L. (E.) *sub nom.* DYSON *v.* FORSTER. DYSON *v.* SEED, QUIN, AND MORGAN - - [1909] **A. C. 98**

—— *General Accident, Fire and Life Assurance Corporation* v. *Robertson*, (1909) S. C. 344.
Affirmed by H. L. (Sc.)
[1909] **A. C. 404**

CASES—*continued.*

—— *General Billposting Co.* v. *Atkinson*, [1908] 1 Ch. 537.
Affirmed by H. L. (E.)
[1909] **A. C. 118**

—— *George* v. *Glasgow Coal Co.*, (1908) S. C. 846.
Affirmed by H. L. (Sc.)
[1909] **A. C. 123**

—— *Gillespie* v. *Riddell* - (1908) S. C. 628
Affirmed by H. L. (Sc.)
[1909] **A. C. 130**

—— *Great Central Ry. Co.* v. *Banbury Union*, [1907] 1 K. B. 717.
Reversed by H. L. (E.)
[1909] **A. C. 78**

—— *Great Central Ry. Co.* v. *Sheffield Union*, [1908] 1 K. B. 750.
Reversed by H. L. (E.) *sub nom.* GREAT CENTRAL RAILWAY COMPANY *v.* BANBURY UNION. SHEFFIELD UNION *v.* GREAT CENTRAL RAILWAY COMPANY
[1909] **A. C. 78**

—— *Great Western Ry. Co.* v. *Midland Ry. Co.*, [1908] 2 Ch. 644.
Affirmed by H. L. (E.) *sub nom.* MIDLAND RAILWAY COMPANY *v.* GREAT WESTERN RAILWAY COMPANY
[1909] **A. C. 445**

—— *Inland Revenue* v. *Oliver*, (1909) S. C. 248
Affirmed by H. L. (Sc.)
[1909] **A. C. 427**

—— *Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. 545.
Affirmed by H. L. (E.) *sub nom.* REFUGE ASSURANCE COMPANY *v.* KETTLEWELL
[1909] **A. C. 243**

—— *Kirkheaton Local Board* v. *Ainley*, [1892] 2 Q. B. 274.
Reasoning in, approved upon one point by H. L. (E.). BUTTERWORTH *v.* WEST RIDING OF YORKSHIRE RIVERS BOARD
[1909] **A. C. 45**

—— *London and India Docks Co.* v. *Thames Steam Tug and Lighterage Co.*, [1908] 1 K. B. 786.
Reversed by H. L. (E.) [1909] **A. C. 15**

—— *London and South Western Ry. Co.* v. *Gomm*, (1882) 20 Ch. D. 562, 580.
Approved on one point by H. L. (E.). EDWARDS *v.* EDWARDS
[1909] **A. C. 275**

—— *Lord's Trustee* v. *Great Eastern Ry. Co.*, [1908] 2 K. B. 54.
Reversed by H. L. (E.) *sub nom.* GREAT EASTERN RAILWAY COMPANY *v.* LORD'S TRUSTEE - [1909] **A. C. 109**

—— *Low* v. *Guthrie* - - (1907) S. C. 1240
Affirmed by H. L. (Sc.) [1909] **A. C. 278**

—— *Low or Jackson* v. *General Steam Fishing Co.*, (1909) S. C. 63.
Reversed by H. L. (Sc.)
[1909] **A. C. 523**

CASES—*continued.*

—— *McDougall & Bonthron, Ld.* v. *London and India Docks Co. Page, Son & East, Ld.* v. *the Same*, [1908] 2 K. B. 175.
Reversed by H. L. (E.) *sub nom.* LONDON AND INDIA DOCKS COMPANY *v.* MCDOUGALL & BONTHRON, LIMITED. LONDON AND INDIA DOCKS COMPANY *v.* PAGE, SON & EAST, LIMITED
[1909] **A. C. 25**

—— *Midland Ry. Co.* v. *Myers, Rose & Co.*, [1908] 2 K. B. 356.
Affirmed by H. L. (E.) [1909] **A. C. 13**

—— *Nairn* v. *University of St. Andrews*, (1908) S. C. 113.
Affirmed by H. L. (Sc.)
[1909] **A. C. 147**

—— *Newport Union* v. *Stead. Newport Union* v. *Green*, [1907] 2 K. B. 460.
Reversed by H. L. (E.) *sub nom.* GREEN *v.* NEWPORT UNION. STEAD *v.* NEWPORT UNION - [1909] **A. C. 35**

—— *O'Donovan* v. *Cameron, Swan & Co.*, [1901] 2 I. R. 633.
Dissented from by H. L. (Sc.). UNITED COLLIERIES, LIMITED *v.* SIMPSON
[1909] **A. C. 383**

—— *Ogilvie, In re* - (1871) L. R. 7 Ch. 174
Approved by H. L. (I.). S. PEARSON & SON, LIMITED *v.* DUBLIN AND SOUTH EASTERN RAILWAY COMPANY
[1909] **A. C. 217**

—— *Pollard, In re*, (1868) 5 Moo. P. C. (N.S.) 111; L. R. 2 P. C. 106.
Followed by P. C. CHANG HANG KIU *v.* PIGGOTT - [1909] **A. C. 312**

—— *Postmaster-General* v. *National Telephone Co.*, [1908] 2 Ch. 172.
Reversed by H. L. (E.)
[1909] **A. C. 269**

—— *Reed* v. *Great Western Ry. Co.*, [1909] A. C. 31.
Distinguished by H. L. (Sc.). LOW OR JACKSON *v.* GENERAL STEAM FISHING COMPANY - - [1909] **A. C. 523**

—— *Rex* v. *Local Government Board, Ex parte South Stoneham Union*, [1908] 2 K. B. 368.
Reversed by H. L. (E.) *sub nom.* LOCAL GOVERNMENT BOARD *v.* SOUTH STONEHAM UNION - [1909] **A. C. 57**

—— *Rex* v. *West Riding of Yorkshire Justices* [1908] 2 K. B. 635.
Affirmed by H. L. (E.) *sub nom.* DENABY PARISH OVERSEERS *v.* DENABY AND CADEBY MAIN COLLIERIES, LIMITED [1909] **A. C. 247**

—— *Rhondda Urban Council* v. *Taff Vale Ry. Co.*, [1908] 1 K. B. 239.
Reversed by H. L. (E.)
[1909] **A. C. 253**

—— *Roger* v. *Cochrane (J. P.) & Co.*, (1907-1908) 25 Rep. Pat. Cas. 9, 757.
Reversed by H. L. (Sc.)
[1909] **A. C. 286**

CASES—*continued.*

—— *Rowe* v. *Gough* - [1908] 1 I. R. 402
Reversed by H. L. (I.) *sub nom.* ROWE *v.* GOUGH. GOUGH *v.* BOLTON
[1909] A. C. 64

—— *Salmon* v. *Quin & Axtens, Ld.*, [1909] 1 Ch. 311.
Affirmed by H. L. (E.) *sub nom.* QUIN & AXTENS, LIMITED *v.* SALMON
[1909] A. C. 442

—— *Schofield* v. *Orrell Colliery Co.*, [1909] 1 K. B. 178.
Affirmed by H. L. (E.) *sub nom.* ORRELL COLLIERY COMPANY *v.* SCHOFIELD - [1909] A. C. 433

—— *Schwan, The*, [1909] P. 93.
Reversed by H. L. (E.) *sub nom.* ABRAM LYLE & SONS *v.* OWNERS OF STEAMSHIP SCHWAN. THE SCHWAN
[1909] A. C. 450

—— *Stepney Corporation* v. *Gingell, Son & Foskett, Ld.*, [1908] 1 K. B. 115.
Affirmed by H. L. (E.)
[1909] A. C. 245

—— *United Collieries, Ld.* v. *Simpson*, (1908) S. C. 1215.
Affirmed by H. L. (Sc.)
[1909] A. C. 383

CEYLON—Laws of.
See PRIVY COUNCIL APPEALS. 12, 13.

CHINA AND COREA—Laws of.
See PRIVY COUNCIL APPEALS. 14.

CIVIL SERVICE — Compensation on retirement - - - - - - - 353
See PRIVY COUNCIL APPEALS. 17.

CLERGY—Income tax—Incumbent of benefice—Easter offerings - - - 104
See REVENUE. 2.

COAL—Contract to deliver on specific terms all the coal required for use in the plaintiffs' works—Construction—Breach of contract—Appeal from Nova Scotia - 293
See PRIVY COUNCIL APPEALS. 20.

COAL MINES.
See under MINE.

CODICIL.
See under WILL.

COLLATERAL COVENANT—Covenant running with the land—Underlease - - 72
See LANDLORD AND TENANT.

COMPANY—*Directors—Articles of Association—Construction—Vesting of Management in Directors—Control of Management by Company in General Meeting.*

By the 75th article of association of a company the business of the company was to be managed by the directors, who might exercise all the powers of the company "subject to such regulations (being not inconsistent with the provisions of the articles) as may be prescribed by the company in general meeting." By the 80th article no resolution of a meeting of the directors having for its object the acquisition or letting of premises should be valid unless notice should have been given to each of the managing directors A. and B. and neither of them should have dissented therefrom.

The directors passed resolutions with the object of acquiring and letting premises, from which B. duly dissented, and resolutions to the same effect were passed at an extraordinary general meeting of the company by a simple majority of the shareholders:—

Held, that upon the true construction of the articles the resolutions of the company were inconsistent with the provisions of the articles and that the company must be restrained from acting upon them.

Decision of the Court of Appeal, *sub nom. Salmon* v. *Quin & Axtens, Ld.*, [1909] 1 Ch. 311, affirmed.

QUIN & AXTENS LIMITED *v.* SALMON
H. L. (E.) 442

—— Stamp duty—Consolidation of debenture stock—Issue of loan capital - - 7
See REVENUE. 4.

—— Stamp duty—Double duty—Transfer of powers, liabilities, and immunities to another railway company - - 1
See REVENUE. 5.

COMPENSATION—Civil Service — Retirement, Compensation on - - - - 353
See PRIVY COUNCIL APPEALS. 17.

—— Subsidence—Mining lease—Covenant running with the land - - - 98
See COVENANT.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONDITION—Insurance (Accident)—Condition in policy—Claim to be made within a year of registration - - - 404
See INSURANCE (ACCIDENT).

—— Leases of machines for shoe manufacture—Restrictive condition as to user—Restraint of trade - - - 330
See PRIVY COUNCIL APPEALS. 10.

CONSIDERATION—Estate duty—Incumbrances—Bona fide creation - - - 466
See REVENUE. 1.

CONTINGENCY — Remoteness — Will — Perpetuity—Executory limitation - 275
See WILL.

CONTRACT—Breach of—Contract of service—Restriction on trade—Wrongful dismissal—Repudiation - - - 118
See MASTER AND SERVANT. 2.

—— Breach of contract—Tort—Wrongful dismissal—Damages - - - 488
See MASTER AND SERVANT. 1.

CONTRACT—*continued.*

—— Coal — Contract to deliver on specified terms all the coal required for use in the plaintiffs' works—Breach of contract—Appeal from Nova Scotia - 293
See PRIVY COUNCIL APPEALS. 20.

—— Vendor and purchaser.
See under VENDOR AND PURCHASER.

CONTRACTOR — Negligence — Article of dangerous nature—Misfeasance—Gas company - - - - - - - - 640
See PRIVY COUNCIL APPEALS. 7.

CONVEYANCING AND LAW OF PROPERTY—Mining lease—Compensation for subsidence—Covenant running with the land - - - - - - - - 98
See COVENANT.

COREA (CHINA AND)—Laws of.
See PRIVY COUNCIL APPEALS. 14.

COVENANT — *Compensation for Subsidence—Lease—Owners for Time being—Covenant running with the Land—Benefit of Covenant—Heirs and Assigns of Covenantee—Covenantee not a Party—Mining Lease—Real Property Act*, 1845 (8 & 9 *Vict. c.* 106), *s.* 5—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 58, *sub-s.* 1.

In a mining lease granted by the owners of the minerals (who were not owners of the surface) the lessee (which expression was to include his executors, administrators, and assigns, unless such construction was excluded by the sense or the context) covenanted with the lessors and "as separate covenants with other the owner or owners occupier or occupiers for the time being" of surface lands to pay to the lessors and other the covenantees or covenantee compensation for all damage occasioned by the working of the coal demised. The lease was assigned to a colliery company and damage was occasioned to the surface by the company's working:—

Held, that the covenant was not simply collateral, but affected the nature and value of the land and ran with the land, and that although the surface owners were not parties to the lease, yet under s. 5 of the Real Property Act, 1845, and s. 58, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, the benefit of the covenant might be taken by the devisees of one who was a surface owner at the date of the lease and by the successors in title of others who were surface owners at that date, and that they could sue the executors of the lessee and the colliery company for compensation for damage done to their surface lands.

Decision of the Court of Appeal sub nom. *Forster* v. *Elvet Colliery Co.* *Quin* v. *the Same.* *Seed* v. *the Same.* *Morgan* v. *the Same*, [1908] 1 K. B. 629, affirmed.

Quære, whether s. 5 of the Real Property Act, 1845, is confined to covenants running with the land. DYSON *v.* FORSTER. DYSON *v.* SEED, QUIN, AND MORGAN - - - H. L. (E.) 98

COVENANT—*continued.*

—— Covenant running with the land—Covenant by underlessor with underlessee to perform covenants of head lease — Collateral covenant - - - - - 72
See LANDLORD AND TENANT.

CREDITORS—Railway company—Construction of extension line—Separate undertaking - - - - - - - 217
See RAILWAY. 4.

CRIMINAL LAW—Sentence—Right of appellants to shew cause before sentence—Appeal from Hong Kong - - 312
See PRIVY COUNCIL APPEALS. 15.

CROWN LANDS — New South Wales Crown Lands Alienation Act, 1861 - - 199
See PRIVY COUNCIL APPEALS. 16.

CUSTOM—Lease—Obligation to take over sheep stock on expiration of lease - - 130
See SCOTTISH LAW. 1.

DAMAGE AND DAMAGES—Breach of contract—Tort—Wrongful dismissal—Damages 488
See MASTER AND SERVANT. 1, 2.

—— Contract to deliver on specified terms all the coal required for use in plaintiffs' works — Breach of contract — Specific performance - - - - - 293
See PRIVY COUNCIL APPEALS. 20.

—— Patent—Interpretation of specification—Infringement by licensee - - 285
See PATENT.

—— Ship, Suit to enforce mortgage of a—Exchequer Court of Canada (Admiralty)—Extent of jurisdiction—Plea of set-off 597
See PRIVY COUNCIL APPEALS. 4.

—— Shipowners, Negligence of — Damage to cargo—Seaworthiness - - - 450
See SHIPPING. 1.

DEATH—Workmen's compensation—Death of dependant before making claim - 383
See EMPLOYER AND WORKMAN. 2.

DEEDS OF GIFT—New Zealand Deceased Persons' Estates Duties Act, 1881—Stamp Acts—Verbal gift to holder of a power of attorney - - - - - 633
See PRIVY COUNCIL APPEALS. 19.

DEPENDANT — Workmen's compensation — Death of dependant before making claim - - - - - - - 383
See EMPLOYER AND WORKMAN. 2.

—— Workmen's compensation—"Dependant"—Posthumous illegitimate child - 433
See EMPLOYER AND WORKMAN. 3.

DEPOSIT—By purchaser to guarantee fulfilment of contract—Default by purchaser or his assignee—Action to recover deposit dismissed - - - - - - 576
See PRIVY COUNCIL APPEALS. 6.

DIRECTORS—Vesting of management in directors—Control of management by company in general meeting - - 442
See COMPANY.

DISMISSAL—Contract of service—Restriction on trade—Wrongful dismissal as repudiation—Breach of contract - 118
See MASTER AND SERVANT. 2.

—— Workman—Inducing dismissal by threats —"Trade dispute" - - - 506
See TRADE UNION.

—— Wrongful dismissal—Breach of contract—Tort—Damages - - - - 488
See MASTER AND SERVANT. 1.

DISTRIBUTION—Period of—Will—Institution of heirs in specified proportions — Tenant for life - - - - 347
See PRIVY COUNCIL APPEALS. 11.

DIVIDED PARISHES AND POOR LAW AMENDMENT ACT - - - 57
See POOR LAW.

DOCK COMPANY — Ship — Exemption from dock rates—Lighter—London and St. Katherine Docks Act - - - 25
See SHIPPING. 3.

—— Ship—Exemption from dock rates—Lighter —West India Docks Act - - 15
See SHIPPING. 2.

DOMICIL — Will — Power of appointment — Foreign donee of power domiciled abroad—Power exercised in accordance with English law but not with law of domicil - - - - - - 446
See POWER OF APPOINTMENT.

DOMINION RAILWAY ACT, 1906—Construction—Laws of Canada - - - 325
See PRIVY COUNCIL APPEALS. 2.

DRAINS.
See under SEWERS.

DUTY.
See under REVENUE.

EARNINGS—Workmen's compensation—"Average weekly earnings" - - - 435
See EMPLOYER AND WORKMAN. 1.

EASTER OFFERINGS—Income tax — Incumbent of benefice - - - - 104
See REVENUE. 2.

EMPLOYER AND WORKMAN—*Compensation —Basis of Calculation—"Average Weekly Earnings"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., ss.* 1, 2.

In estimating for the purpose of compensation under the Workmen's Compensation Act, 1906, the amount of a workman's "average weekly earnings" the true test is what were his earnings in a normal week, regard being had to the known and recognized incidents of the

EMPLOYER AND WORKMAN—*continued.*

employment. If work was discontinuous, that is an element which must be taken into account.

Decision of the Court of Appeal, [1909] 1 K. B. 352, affirmed. ANSLOW *v.* CANNOCK CHASE COLLIERY COMPANY, LIMITED
H. L. (E.) 435

2. —— *Compensation—Death of Dependant before making Claim—Right of Representative of deceased Dependant to claim Compensation—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-ss.* 1 *and* 2, *and Sched. I., s.* 1, *sub-s.* (*a*) (i.)—*Maxim* "*Actio personalis moritur cum persona.*"

The right of a dependant of a deceased workman to make a claim and take proceedings under the Workmen's Compensation Act, 1906, passes to the executor of the sole dependant who has died without having made a claim.

The maxim "Actio personalis moritur cum persona" is not applicable to cases under the Workmen's Compensation Act, 1906.

A workman in the employment of the appellants, a colliery company, was knocked down by a waggon while in the course of his employment on July 9, 1907. He died of his injuries on July 14. His mother, alleged to have been dependent upon him, died on October 16, 1907, without making any claim upon the appellants. Her executrix made a claim on December 10, 1907, under the Workmen's Compensation Act, 1906, as representative of the mother :—

Held, affirming the decision of the First Division of the Court of Session (Lord Dunedin dissenting), (1908) S. C. 1215, that the claim must be admitted in law.

Darlington v. *Roscoe & Sons*, [1907] 1 K. B. 219, approved.

O'Donovan v. *Cameron, Swan & Co.*, [1901] 2 I. R. 633, dissented from. UNITED COLLIERIES, LIMITED *v.* SIMPSON (OR HENDRY)
H. L. (Sc.) 383

3. —— *Compensation—"Dependant"—Posthumous Illegitimate Child—Workmen's Compensation Act*, 1906 (6 *Edw.* 7. *c.* 58), *ss.* 1, 13.

A workman, who had admitted that he was the father of a child en ventre sa mère and had promised to marry the mother and intended to provide for the child, was killed by an accident for which his employers were liable to pay compensation. The child was born some months afterwards :—

Held, that the child was a "dependant" within the meaning of the Workmen's Compensation Act, 1906, and entitled to compensation.

Decision of the Court of Appeal, sub nom. *Schofield* v. *Orrell Colliery Co.*, [1909] 1 K. B. 178, affirmed. ORRELL COLLIERY COMPANY *v.* SCHOFIELD - - - - H. L. (E.) 433

4. —— *Compensation—Engine Driver—Accident to Workman "arising out of and in the course of the Employment"—Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 1.

An engine driver in charge of his engine left it, and, for a purpose of his own and not in the execution of his duty or in the interest of his employers, crossed a siding. On returning to

EMPLOYER AND WORKMAN—*continued.*
his engine he was killed by a waggon which was being shunted :—

Held, that the accident did not arise out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897, s. 1. REED *v.* GREAT WESTERN RAILWAY COMPANY - - - **H. L. (E.) 31**

5. —— *Compensation—Refusal of Sheriff to state a Case—Accident arising "out of and in the course of" the Employment—Workmen's Compensation Act*, 1906 (6 *Edw. 7, c.* 58), *s.* 1, *sub-s.* 1.

The appellant's husband was employed by the respondents to watch trawlers as they lay in Granton Harbour. He was on duty for twenty-five hours, during which time he had to provide his own food ; and in connection with his duties it was occasionally necessary for him to be on the quay. In the course of his watch he left the trawlers and went to an hotel which was a short distance away from the harbour, where he got half a glass of whisky and a glass of beer. He was absent a very short time, and on his return to the quay, while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned :—

Held, reversing the decision of the Second Division of the Court of Session, (1909) S. C. 63 (Lord Loreburn L.C. and Lord Gorell dissenting), that the accident arose "out of and in the course of" the employment of the deceased within the meaning of the Workmen's Compensation Act, 1906, for when the accident occurred he had returned to the quay which was the scene or sphere of his duty.

By Lord Loreburn L.C : That the deceased at the time of the accident was not using the ladder in the course of his employment, inasmuch as he was not upon the ladder in the course of his duty, but in the course of returning to it.

By Lord Gorell : That the deceased had no business to leave his duty of watching, and that the accident occurred during an excursion which he had made for his own purposes.

Reed v. *Great Western Ry. Co.*, [1909] A. C. 31, distinguished.

Query, must a party claiming compensation under the Workmen's Compensation Act, 1906, prove affirmatively not only that the accident causing the injury happened during the workman's employment, but also arose out of and in the course of his employment ? And if the facts proved are equally consistent with the existence or non-existence of the essential conditions, must the applicant fail ?

Practice—Appeal—Competency—Workmen's Compensation Act, 1906.

In a Scottish case the sheriff-substitute refused to state a case for the opinion of the Court of Session on the ground that the question proposed was not a question of law, but of fact. The Court being of opinion that the sheriff as arbitrator was bound to state a case, it was thereupon, on the suggestion of the Court and in order to minimize expenses, agreed by the parties that instead of the case being remitted to the

EMPLOYER AND WORKMAN—*continued.*
sheriff it should be disposed of as "if upon a case stated by the sheriff in terms of the statute" :—

Held, that the judgment of the Court of Session following on the said agreement was not pronounced extra cursum curiæ and was subject to appeal. LOW OR JACKSON (PAUPER) *v.* GENERAL STEAM FISHING COMPANY **H. L. (Sc.) 523**

6. —— *Compensation—"Serious and wilful Misconduct" — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 2 (*c*)—*Coal Mines Regulation Act*, 1887 (50 *&* 51 *Vict. c.* 58), *ss.* 49, 51, 52 ; *r.* 3.

By the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 2 (*c*), if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall . . . . be disallowed.

The appellant was a bottomer in the respondents' colliery. His working place was at a mid-working situate forty feet above the main coal bottom. The mid-working was a working to which No. 3 of the additional special rules of the Coal Mines Regulation Acts, 1887 to 1896 (50 & 51 Vict. c. 58 and 59 & 60 Vict. c. 43), applied. That rule was, inter alia, "That the bottomer shall not open the gate fencing the shaft until the cage is stopped at such mid-working." On the occasion when the accident happened the appellant called for the cage to ascend, and he, expecting the cage to stop at his level without any further signal being given, and acting on this assumption without ascertaining whether the cage had stopped, opened the gate guarding the shaft, went some three yards along the level behind a full hutch, and pushed the hutch forward to the shaft. The cage had passed the level without stopping, and the appellant pushed the hutch into the shaft and fell with it :—

Held (affirming the decision of the First Division of the Court of Session, (1908) S. C. 846), that there was evidence on which a reasonable man could hold that the appellant had been guilty of "serious and wilful misconduct," and therefore the appellant was not entitled to compensation.

Observations *per* Lord Loreburn L.C. and Lord Robertson on the extent to which the breach of a rule may be prima facie evidence of misconduct. GEORGE *v.* GLASGOW COAL COMPANY - - - - - **H. L. (Sc.) 123**

—— Breach of contract—Tort—Wrongful dismissal—Damages - - - **488**
See MASTER AND SERVANT. 1.

—— Contract of service—Restriction on trade—Wrongful dismissal as repudiation—Breach of contract - - - **118**
See MASTER AND SERVANT. 2.

—— Trade union.
See under TRADE UNION.

ENGINE DRIVER — Workmen's compensation - - - - - - - **31**
See EMPLOYER AND WORKMAN. 4

ENTAIL—Lease—Power of heir of entail in possession to burden the estate—Sheep stock—Custom - - - - - 130
See SCOTTISH LAW. 1.

—— Succession duty — Propulsion of fee — "Acceleration" of succession - 166
See REVENUE. 6.

ESTATE DUTY—Revenue.
See under REVENUE.

EXECUTORY LIMITATION—Will—Perpetuity —Contingency—Remoteness - 275
See WILL.

FACTORY—Sewers—Facilities for carrying off liquids from factories—Rivers pollution prevention - - - - - - 438
See SEWERS.

FENCE—Railway company—Defective fence—Negligence—Turntable—Infant trespasser—Invitation to danger - 229
See RAILWAY. 2.

FINANCE ACTS.
See under REVENUE.

FIRE—Railway company—Damages by fire—Admissibility of railway map by the Appellate Court—Right of way - 361
See PRIVY COUNCIL APPEALS. 3.

FOREIGN DONEE OF POWER — Domiciled abroad — Will — Exercise of power—Power exercised in accordance with English law but not with law of domicil - - - - - - 446
See POWER OF APPOINTMENT.

FORFEITURE—Ship, Decree of forfeiture of—Supreme Court of China and Corea—Jurisdiction - - - - - - 562
See PRIVY COUNCIL APPEALS. 14.

FRANCHISE—Parliament.
See under PARLIAMENT.

FRAUD — Insurance (Life) — Voidable policy—Principal retaining benefit obtained by fraud of agent—Recovery of paid premiums - - - - - - - 243
See INSURANCE (LIFE).

GAS COMPANY — Negligence—Article of dangerous nature — Contractor — Misfeasance - - - - - - 640
See PRIVY COUNCIL APPEALS. 7.

GLASGOW (CITY OF) ACT, 1891. - - 138
See SCOTTISH LAW. 3.

GLASGOW POLICE ACT, 1866 - - - 138
See SCOTTISH LAW. 3.

GUARDIANS—Poor law—Dissolution of union—Uniting of parishes—Consent of guardians - - - - - - - 57
See POOR LAW.

HIGHWAY — "Bridge" — Approaches — Public carriage road carried over railway — Width of bridge—Liability of railway company - - - - - - 253
See RAILWAY. 1.

—— Bridge carrying public highway over railway—Liability to maintain road . 138
See SCOTTISH LAW. 3.

HONG KONG—Laws of.
See PRIVY COUNCIL APPEALS. 15.

ILLEGITIMACY—Marriage of adulterers—Illegitimacy of children procreated in adultery —Appeal from Ceylon - - - 376
See PRIVY COUNCIL APPEALS. 13.

—— Workmen's compensation — "Dependant" —Posthumous illegitimate child - 433
See EMPLOYER AND WORKMAN. 3.

INCOME TAX.
See under REVENUE.

INCUMBERED ESTATES COURT (IRELAND) ACT - - - - - - - 64
See IRISH LAW.

INFANT—Railway company—Defective fence —Negligence—Turntable—Infant trespasser—Invitation to danger - 229
See RAILWAY. 2.

INFRINGEMENT—Patent.
See under PATENT.

INSURANCE (ACCIDENT)—*Condition in Policy —Claim to be made within a Year of Registration.*

In a copy of Letts's Diary for the year 1906, of which the respondent's husband was owner, there was a coupon policy of insurance which stated that a thousand pounds would be paid to the executors of any owner of the diary fatally injured in a railway accident if he had caused his name to be registered at the head office of the appellants, an insurance company, and if the claim was made within twelve months of the registration. The respondent's husband filled up the form of application for registration by inserting his name and address and the date, December 25, 1905, and forwarded it to the appellants' office. The appellants kept no register, but date stamped and filed the applications. The respondent's husband received a letter from the appellants, dated January 3, 1906, enclosing an official acknowledgment, dated December 29, 1905, of the registration of his name as being insured against accidents in the terms of the coupon. He was injured in a railway accident on December 28, 1906, and died the next day. The respondent, his executor, gave notice of the claim on January 2, 1907. The appellants denied liability, on the ground that the date of registration was December 27, 1905, and that the insurance ended on December 27, 1906 :—

Held (affirming the decision of the Court of Session, (1909) S. C. 344), that the twelve months within which the claim must be made had not expired when the claim was made, January 2, 1907, for, there being no regular register, the date of registration must be taken to be the date

INSURANCE (ACCIDENT)—*continued.*

when the bundle of applications, containing that of the deceased, were arranged alphabetically and filed; and that, in the absence of any definite proof of this date, it must be held, as against the respondents, to be January 3, 1906, the date of the letter containing an official acknowledgment of the registration, and that the claim was accordingly made within the prescribed period.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION *v.* ROBERTSON (OR HUNTER) - - - - - - **H. L. (Sc.) 404**

INSURANCE (LIFE)—*Voidable Policy—Principal retaining Benefit obtained by Fraud of Agent—Recovery of paid Premiums.*

The holder of a policy of insurance being minded to give up paying the premiums was persuaded to continue the payments by a false representation of the insurance company's agent that if she paid the premiums for a certain time she would receive a free policy. The representation was made without the authority or knowledge of the company, and the company refused to grant a free policy, but retained the premiums :—

Held, that the holder of the policy was entitled to recover from the company the premiums paid upon the faith of the representation.

Decision of the Court of Appeal, [1908] 1 K. B. 545, affirmed.

REFUGE ASSURANCE COMPANY *v.* KETTLEWELL - - - - - - **H. L. (E.) 243**

IRISH LAW—*Landed Estates Court, Ireland—Land Judge's Conveyance—Lands sold subject to Jointure but indemnified against Jointure by unsold Lands—Jointure prior to Incumbrances—Rights of Jointress—Incumbered Estates Court (Ireland) Act*, 1858 (21 *&* 22 *Vict. c.* 72), *ss.* 61, 85.

Lands sold under the Incumbered Estates Court (Ireland) Act, 1858, were sold subject to a jointure annuity but indemnified against the jointure by unsold lands, and were so conveyed to the purchasers. Before the sale and conveyance the jointure ranked after incumbrances upon the lands :—

Held, that after the sale and conveyance the effect of s. 61 of the Act of 1858 was to give the jointress the first charge upon the sold lands, and to give those lands a preferential charge in respect of the indemnity upon the indemnifying lands.

Decisions of the Court of Appeal in Ireland, [1907] 1 I. R. 380 and [1908] 1 I. R. 402, reversed, and decisions of Ross J., [1907] 1 I. R. 380, restored. ROWE *v.* GOUGH. GOUGH *v.* BOLTON **H. L. (I.) 64**

—— Railway company—Extension of powers—Application of assets—Construction of extension line — Creditors — Separate undertaking - - - - - **217**
See RAILWAY. 4

JOINTURE—Incumbered Estates Court (Ireland) Act—Rights of jointress - - **64**
See IRISH LAW.

JURISDICTION—Canada—Exchequer Court of Canada (Admiralty)—Extent of jurisdiction—Suit to enforce mortgage of a ship - - - - - - - **597**
See PRIVY COUNCIL APPEALS. 4.

—— China and Corea, Supreme Court of—Decree of forfeiture of ship - **562**
See PRIVY COUNCIL APPEALS. 14.

JUSTICES—Rates.
See under RATES.

LADING, BILL OF—Shipping.
See under SHIPPING.

LAND—New South Wales Crown Lands Act, 1861 - - - - - - **199**
See PRIVY COUNCIL APPEALS. 16.

LANDED ESTATES COURT, IRELAND—Rights of jointress—Incumbered Estates Court (Ireland) Act - - - - - **64**
See IRISH LAW.

LANDLORD AND TENANT—*Covenant running with the Land—Covenant by Underlessor with Underlessee to perform Covenants of Head Lease—Collateral Covenant.*

There is no authority for the proposition that a covenant in a lease to do an act not in respect of the demised premises, but which will protect from forfeiture the estate of the lessee in those premises, is a covenant which runs with the land.

A lease for years of land contained a covenant by the lessee to keep in repair all buildings erected on the land and a proviso for re-entry for breach of that covenant. Of several houses erected on the land two were demised by an underlease in which the underlessor covenanted for himself and his assigns with the underlessee and his assigns (1.) for quiet enjoyment; (2.) for the performance of the covenants of the head lease by the lessee thereof so far as they affected the land included in the head lease and not demised in the underlease; (3.) to indemnify the underlessee and his assigns against breaches of those covenants. The underlessor's assignee (in whom the head lease had vested) failed to perform the covenant to repair in the head lease, and the head lessor re-entered on all the land demised by the head lease and ejected the assignee of the underlessee from the two houses demised by the underlease :—

Held, that the covenant in the underlease to perform the covenant in the head lease relating to premises not demised by the underlease, being a covenant not touching or concerning the land demised in the underlease, did not run with the land, and that the assignee of the underlessor was not liable for breaches of the above-named covenants in the underlease.

Decision of the Court of Appeal, [1908] 1 K. B. 94, affirmed. DEWAR *v.* GOODMAN **H. L. (E.) 72**

—— Mines and minerals—Construction clause against working adjoining minerals—Absolute prohibition - - - **417**
See MINE.

LANDLORD AND TENANT—*continued.*

—— Mining lease — Compensation for subsidence — Covenant running with the land - - - - - - - 98
See COVENANT.

—— Sheep—Objection to take over sheep stock on expiration of lease—Custom - 130
See SCOTTISH LAW. 1.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

LEASES — Machines for shoe manufacture — Restrictive condition as to user — Restraint of trade - - - 330
See PRIVY COUNCIL APPEALS. 10.

LIEN—Carriers'—Goods on land in tenancy of trader—Detainer of goods - - 109
See BILL OF SALE.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIGHTER — Dock rates, Exemption from — London and St. Katherine Docks - 25
See SHIPPING. 3.

—— Dock rates, Exemption from—West India Docks - - - - - - 15
See SHIPPING. 2.

LIMITATION — Will — Perpetuity — Executory limitation — Contingency—Remoteness
See WILL. 275

LOCAL GOVERNMENT—General district rate—Assessment—Tramroad - - 264
See RAILWAY. 5.

—— Poor Law.
See under POOR LAW.

—— River.
See under RIVER.

—— Sewers.
See under SEWERS.

LONDON AND ST. KATHERINE DOCKS — Lighter — Exemption from dock rates.
See SHIPPING. 3. 25

MALICIOUS PROSECUTION—Action for—Onus probandi—Laws of Ceylon - - 549
See PRIVY COUNCIL APPEALS. 12.

MAP — Admissibility of railway map by the Appellate Court—Right of way - 361
See PRIVY COUNCIL APPEALS. 3.

MARKET—*Right in Salesman subject to Directions to move to a more convenient Place according to the Opinion of the proper Authority—Form of Order.*

Judgment of the Court of Appeal, [1908] 1 K. B. 115, affirmed. STEPNEY CORPORATION *v.* GINGELL, SON & FOSKETT, LIMITED
H. L. (E.) 245

MARRIAGE—Adulterers, Marriage of—Illegitimacy of children procreated in adultery —Appeal from Ceylon - - 376
See PRIVY COUNCIL APPEALS. 13.

MASTER AND SERVANT—*Breach of Contract —Tort—Wrongful Dismissal—Damages.*

Where a servant is wrongfully dismissed from his employment the damages to which he is entitled cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment :—

So *held* by Lord Loreburn L.C. and Lords James of Hereford, Atkinson, Gorell, and Shaw of Dunfermline (Lord Collins dissenting). ADDIS *v.* GRAMOPHONE COMPANY - **H. L. (E.) 488**

2. —— *Contract of Service—Restriction on Trade—Wrongful Dismissal—Right of Servant to treat Wrongful Dismissal as Repudiation and to sue for Breach of Contract — Mutual and Independent Covenants.*

Employers agreed with their manager that he should hold office subject to termination at twelve months' notice by either party and with a restriction on his right to trade after its termination. The employers having wrongfully dismissed him without notice :—

Held, that he was entitled to treat the dismissal as a repudiation of the contract and to sue them for damages for breach of contract, and was no longer bound by the restriction on trade.

Decision of the Court of Appeal, [1908] 1 Ch. 537, affirmed. GENERAL BILLPOSTING COMPANY, LIMITED *v.* ATKINSON
H. L. (E.) 118

—— Employer and workman.
See under EMPLOYER AND WORKMAN.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

MAXIM—"Actio personalis moritur cum persona" - - - - - - 383
See EMPLOYER AND WORKMAN. 2.

MERCHANT SHIPPING.
See under SHIPPING.

MIDLAND RAILWAY COMPANY (RATES AND CHARGES) ORDER CONFIRMATION ACT, 1891 - - - - - 13
See RAILWAY. 6.

MINE — *Lease — Mines and Minerals — Construction Clause against working adjoining Minerals—Absolute Prohibition.*

The pursuers were the trustees and proprietors of part of the lands of A. The defenders were tenants of the coal seams under the said lands, but the mineral field worked by the defenders comprised also coal seams under lands belonging to several adjoining proprietors which were worked by pits on the said lands of A. The whole was to be worked as one general scheme. The pursuers sought to enforce as absolute against the defenders the following prohibition contained in a minute of agreement of the same

MINE—*continued.*
date as the leases:—"The second parties (the defenders) hereby undertake and bind themselves and their foresaids that from and after . . . . they will work the coal in the adjoining properties only to such an extent as to enable them to pay the several proprietors thereof such sums of lordship as will amount to but not exceed the fixed rents agreed by their existing leases to be paid to such proprietors respectively: Declaring that if in any year during the currency of this lease the sums payable to such adjoining proprietors shall exceed the said fixed rents (which amount in cumulo to 550*l.* sterling per annum) then and in that event the second parties shall be bound . . . . to pay to the first party (the pursuers' author) the sum of one penny per ton on every ton of coal worked from the lands of such adjoining proprietors in excess of the quantities necessary to make up . . . . the said fixed rents . . . . In consideration whereof the first party . . . . renounces from and after . . . . the right to exact the wayleave of one penny per ton presently payable to him":—

Held (reversing the decision of the First Division of the Court of Session, (1908) 45 Sc. L. R. 290), that the clause was an absolute prohibition and not one giving the defenders a licence to work as much coal as they pleased from beneath the adjoining lands so long as they paid the stipulated one penny per ton. FORREST *v.* MERRY & CUNINGHAME, LIMITED
H. L. (Sc.) 417

—— Subsidence, Compensation for — Mining lease—Benefit of covenant—Heirs and assigns of covenantee—Covenantee not a party - - - - - - 98
See COVENANT.

—— Workmen's compensation — Coal Mines Regulation Act, 1887—"Serious and wilful misconduct" - - - 123
See EMPLOYER AND WORKMAN. 6.

MINERALS.
See under MINE.

MISCONDUCT — Workmen's compensation — "Serious and wilful misconduct" 123
See EMPLOYER AND WORKMAN. 6.

MISFEASANCE — Negligence — Article of dangerous nature — Contractor — Gas company - - - - - 640
See PRIVY COUNCIL APPEALS. 7.

MORTGAGE—Ship—Exchequer Court of Canada (Admiralty)—Extent of jurisdiction—Suit to enforce mortgage of a ship 597
See PRIVY COUNCIL APPEALS. 4.

NEGLIGENCE—Article of dangerous nature — Contractor — Misfeasance—Gas company - - - - - - - 640
See PRIVY COUNCIL APPEALS. 7.

—— Railway company—Defective fence—Turntable—Infant trespasser—Invitation to danger - - - - - - 229
See RAILWAY. 2.

NEGLIGENCE—*continued.*
—— Shipowners—Bill of lading—Damage to cargo—Seaworthiness - - 450
See SHIPPING. 1.

NEW SOUTH WALES—Laws of.
See PRIVY COUNCIL APPEALS. 16—18.

NEW ZEALAND—Laws of.
See PRIVY COUNCIL APPEALS. 19.

NEXT OF KIN — Will, Construction of — Destination of the subject of void gifts —Residuary legatees—Res judicata — Appeal from the Straits Settlements 615
See PRIVY COUNCIL APPEALS. 24.

NOTICE—Appeal—Poor rate—Notice to assessment committee—Entry and respite of appeal - - - - - - 247
See RATES. 1.

NOVA SCOTIA—Laws of.
See PRIVY COUNCIL APPEALS. 20.

ONTARIO—Laws of.
See PRIVY COUNCIL APPEALS. 5—8.

ONUS PROBANDI—Action for malicious prosecution—Laws of Ceylon - - - 549
See PRIVY COUNCIL APPEALS. 12.

OPIUM—Straits Settlements Opium Ordinance, 1906—Construction - - - 317
See PRIVY COUNCIL APPEALS. 22.

PARLIAMENT — Franchise — Right of women graduates to vote - - - 147
See SCOTTISH LAW. 2.

PAROCHIAL ASSESSMENT—Rates.
See under RATES.

PATENT—*Interpretation of Specification—Infringement by Licensee—Damages.*

The appellant was assignee of letters patent for an invention relating to an improvement in balls for use in the game of golf.

The specification set forth: "In carrying out my invention I substitute for the core hitherto used a core consisting of an incompressible fluid such as water or other liquid or semi-liquid contained in a suitable receptacle or shell made of elastic material. . . . . Any convenient incompressible fluid having no detrimental action on the receptacle such as water, glycerine or the like may be used to form the core, though in practice I have found that water gives very satisfactory results." And the first claim was for "a ball for use in the game of golf made with a core or nucleus of incompressible fluid forced into and contained within a receptacle of elastic material which, when expanded to the required size, is closed and thereafter wound round with rubber thread or tape substantially as hereinbefore described."

The respondents were the exclusive licensees from the patentee to manufacture for six years golf balls under the patent, which were called "Mingay" balls. These balls were a great success and large numbers were manufactured.

PATENT—*continued.*
Subsequently the respondents manufactured a ball called the "Ace," constructed mechanically in precisely the same way as the "Mingay" ball, but with a core consisting of 85 per cent. of water and 15 per cent. of gelatine. The appellant alleged that the "Ace" ball was an infringement of the specification and claimed damages:—
Held (reversing the decision of the First Division of the Court of Session, (1907—1908) 25 Rep. Pat. Cas. 9, 757), that the specification, which was a part of the respondents' contract of manufacture, included not merely liquids like water, but also sticky substances, and therefore the "Ace" balls were an infringement of the patent and the appellant was entitled to damages in lieu of royalty. ROGER *v.* J. P. COCHRANE & Co. - - - - - - **H. L. (Sc.) 285**

PENANG (SETTLEMENT OF)—Straits Settlements—Laws of.
See PRIVY COUNCIL APPEALS. 23, 24.

PERPETUITY—Will — Executory limitation—Contingency—Remoteness - - **275**
See WILL.

POLICY—Condition in policy—Claim to be made within a year of registration - **404**
See INSURANCE (ACCIDENT).

—— Life insurance.
See under INSURANCE (LIFE).

POOR LAW—*Dissolution of Union—Uniting of Parishes—Consent of Guardians of Union—Local Government—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 11—*Poor Law Amendment Act*, 1844 (7 & 8 *Vict. c.* 101), *s.* 64.
Under the Divided Parishes and Poor Law Amendment Act, 1876, the Local Government Board has power to dissolve any union, whether formed under a general or a local Act.
The consent of the guardians of a union is not required to the uniting of a parish with other parishes under s. 64 of the Poor Law Amendment Act, 1844. The consent required concerns only the guardians of the parish, where there are such guardians.
Decision of the Court of Appeal, [1908] 2 K. B. 368, reversed, and decision of the King's Bench Division restored. LOCAL GOVERNMENT BOARD *v.* SOUTH STONEHAM UNION **H.L. (E.) 57**

—— Poor rate.
See under RATES.

POOR RATE.
See under RATES.

POSTMASTER-GENERAL — Telegraph — Telephone—Monopoly—Private lines - **269**
See TELEGRAPH.

POWER OF APPOINTMENT—*Foreign donee of Power domiciled abroad—Exercise of Power—Power exercised in accordance with English Law but not with Law of Domicil—Will.*
Where an English power of appointment by will is exercised by a will executed in English form, though the appointor be domiciled abroad and the will be not validly executed according to the law of domicil, the document may be admitted to probate as a will for the purpose of the appointment, though not admissible for other purposes. This practice has been too long observed to be now disturbed. MURPHY *v.* DEICHLER - - - - **H. L. (I.) 446**

POWER OF ATTORNEY—Verbal gift to holder of a — Deeds of gift — New Zealand Deceased Persons' Estates Duties Act, 1881—Stamp Acts - - - **633**
See PRIVY COUNCIL APPEALS. 19.

POWERS—Railway company.
See under RAILWAY.

PRACTICE—Appeal.
See under APPEAL.

—— Privy Council Appeals.
See under PRIVY COUNCIL APPEALS.

—— Workmen's compensation — Refusal of sheriff to state a case - - - **523**
See EMPLOYER AND WORKMAN.

PREMIUMS—Insurance (Life)—Voidable policy—Principal retaining benefit obtained by fraud of agent—Recovery of paid premiums - - - - - **243**
See INSURANCE (LIFE).

PRINCIPAL AND AGENT—Insurance (Life)—Voidable policy—Principal retaining benefit obtained by fraud of agent—Recovery of paid premiums - - **243**
See INSURANCE (LIFE).

PRIVY COUNCIL APPEALS—AUSTRALIA—*Practice—Special Leave to Appeal—Australian Commonwealth Constitution Act*, 1900, *s.* 74.
Special leave to appeal from a judgment of the High Court of Australia holding that goods imported by the State Governments are liable to duties of customs under the laws of the Commonwealth was refused although the case was within s. 74 of the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12). ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* COLLECTOR OF CUSTOMS FOR NEW SOUTH WALES - - - - - - **P. C. 345**

—— **NEW SOUTH WALES.**
See Nos. 16—18, below.

—— **QUEENSLAND.**
See No. 21, below.

2. —— **CANADA** — *Railway — Passengers—Third-class Passengers—Fare of a Penny per Mile—Province of Canada* 16 *Vict. c.* 37, *s.* 3—*Dominion Railway Act*, 1906 (6 *Edw.* 7, *c.* 42)—*Construction.*
Sect. 3 of 16 Vict. c. 37 (Province of Canada) is not inconsistent with or impliedly repealed by the Dominion Railway Act, 1906 (6 Edw. 7, c. 42).
Accordingly the appellants are bound to carry third-class passengers for the fare of a penny per mile, and to provide one train every

PRIVY COUNCIL APPEALS—CANADA—*contd.*
day with third-class carriages between Toronto and Montreal. GRAND TRUNK RAILWAY COMPANY OF CANADA *v.* ROBERTSON - **P. C. 325**

3. —— *Railway Map—Railway Act*, 1888, *s.* 134—*Railway Act*, 1903, *ss.* 128, 239—*Admissibility of Railway Map by the Appellate Court—Damages by Fire—Ignition of Combustible Matter on Railways—Right of Way—Negligence—Law of Canada.*

By s. 239 of the Railway Act, 1903 (3 Edw. 7, c. 58), it is provided that the respondent railway company shall at all times keep its right of way free from combustible matter, sub-s. 2 providing that when damage is caused by a fire started by a railway locomotive the company shall be liable whether guilty of negligence or not, in the latter case the liability being limited to a specified amount.

Where ignition occurred from the respondents' engine sparks at a rocky bluff shewn by a map filed by them in the Department of Railways and Canals under s. 134 of the Railway Act of 1888, repeated by s. 128 of the later Act, to be within the delineated right of way, the respondents were held to be liable for the damages assessed by the jury.

The Supreme Court of Canada, having on the objection of the respondents refused to admit the map in evidence on the ground that it had not been tendered at the trial, ordered a new trial :—

Held, that whether or not the Supreme Court was right in refusing to admit the map their Lordships would admit it, that it was conclusive in favour of the appellants, and that there had been no misdirection. BLUE & DESCHAMPS *v.* RED MOUNTAIN RAILWAY COMPANY - **P. C. 361**

4. —— *Shipping—Exchequer Court of Canada (Admiralty)—Extent of Jurisdiction—Suit to enforce Mortgage of a Ship—Admiralty Court Act*, 1861 (*Imperial*), *s.* 11—*Plea of Set-off—Damages for Breach of Building Contract.*

The Exchequer Court of Canada was constituted by the Exchequer Court Act (50 & 51 Vict. c. 16) (Dominion) for the purpose of dealing with matters in which the Crown was concerned (ss. 15 and 16) and has no general common law jurisdiction. It has also under the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27) (Imperial), and the Admiralty Act, 1891 (54 & 55 Vict. c. 29) (Dominion), jurisdiction in Admiralty, including its statutory extensions.

In an action in rem by the appellants in the said Court, British Columbia Admiralty District, to enforce payment of the balance due on the mortgage of a ship, granted in respect of the price of construction, which it was agreed should be treated as money lent, the respondents, the registered transferees of the ship, pleaded by way of equitable defence that they were entitled to set off a sum of money expended by them, which was sufficient to prevent their being in default under the mortgage at the date of the action. It appeared that the set-off was claimed as a defence pro tanto so far as it was for a diminution in value of the ship by reason of its having been built negligently and defectively and not in accordance with contract :—

Held, that under the Admiralty jurisdiction as it formerly existed neither appellants nor respondents could have enforced their claims in an Admiralty Court. But s. 11 of the Admiralty Court Act, 1861, extends that jurisdiction so as to include the claim of the appellants, which was in respect of a mortgage duly registered under the Merchant Shipping Act; while the respondents' defence, though pleaded by way of set-off, in reality involved a cross-claim for unliquidated damages under a contract distinct from the mortgage sued upon, which the Court had no jurisdiction to entertain whether the claim was against the ship or the plaintiffs. BOW, MCLACHLAN & CO. *v.* SHIP "CAMOSUN" AND UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA, LIMITED - - - **P. C. 597**

—— **NOVA SCOTIA.**
See No. 20, below.

5. —— *Ontario—Appeal from an award to High Court—Further Appeal to Supreme Court incompetent—Canada Railway Act*, 1903, *s.* 168—*Supreme and Exchequer Courts Act, R. S. C.*, 1886, *c.* 135, *s.* 26—*Construction.*

Held, that according to the true construction of s. 168 of the Canada Railway Act, 1903, the appeal given thereby to a superior Court from an award under that Act lies in the province of Ontario to either the Court of Appeal or the High Court of Justice therein at the option of an appellant; but that in case of appeal to the High Court, inasmuch as it is not the Court of last resort in the province within the meaning of the Supreme and Exchequer Courts Act, R. S. C., 1886, c. 135, s. 26, there is no appeal therefrom to the Supreme Court of Canada. JAMES BAY RAILWAY COMPANY *v.* ARMSTRONG - - - - - - - **P. C. 624**

6. —— *Ontario—Deposit by Purchaser to guarantee Fulfilment of Contract—Default by Purchaser or his Assignee—Action to recover Deposit dismissed.*

Under a contract for sale of railway stock and also for transfer of debentures to be thereafter executed, a deposit of $250,000 was received by the respondent vendor as security for and to be credited towards the payment of the price on June 1, 1902, or to be forfeited on default. In an action by the assignee of the purchaser without tendering the price to recover back the deposit, as the bonds were not ready for delivery at due date :—

Held that, as the evidence shewed that the purchaser or his assignee was responsible for the non-production and non-completion thereof, there was default by him in payment of the price, and the action must be dismissed. SPRAGUE *v.* BOOTH - - - - - - - **P. C. 576**

7. —— *Ontario — Negligence — Article of Dangerous Nature—Contractor—Misfeasance—Gas Company.*

In actions for damages in respect of an accident against the appellant gas company it appeared that the appellants were not occupiers

of the premises on which the accident had occurred and had no contractual relations with the plaintiffs, but that they had installed a machine on the said premises, and the jury found that the accident was caused by an explosion resulting from gas emitted, owing to the appellants' negligence, through its safety valve direct into the closed premises instead of into the open air :—

Held, that the initial negligence having been found against the appellants in respect of an easy and reasonable precaution which they were bound to have taken, they were liable unless they could shew that the true cause of the accident was the act of a subsequent conscious volition, e.g., the tampering with the machine by third parties. DOMINION NATURAL GAS COMPANY *v.* COLLINS AND PERKINS **P. C. 640**

8. —— *Ontario — Will, Construction of — Testator's Children to take equal Shares in the Residue at Majority—Accumulations of Income during Minority of Donee.*

The testator gave to each child an equal share of the income of the whole of his residuary estate subject to the provision "that until each child attains the age of twenty-five years what would have been his or her share is to accumulate and form part of my general estate" :—

Held, that according to the true construction of this provision the accumulations of each share during conventional minority were intended to increase the general residuary estate of which each child was entitled to a share at twenty-five, and not for the exclusive benefit of the sharer. FULFORD *v.* HARDY - - - - **P. C. 570**

9. —— *Quebec — Dominion overrides Provincial Legislation—Dominion Act 60 & 61 Vict. c. 72—Quebec Act 4 Edw. 7, c. 84, s. 3.*

Where a given field of legislation is within the competence both of the Dominion and Provincial Legislatures, and both have legislated, the Dominion enactment must prevail :—

Held, accordingly, that the respondent company, which under Dominion Act 60 & 61 Vict. c. 72 was empowered to supply, sell, and dispose of gas and electricity, with other powers, could not be restrained from operating thereunder at the suit of the appellants, who under later Quebec statutes had exclusive power of so operating in the locality chosen by the respondents. LA COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS *v.* CONTINENTAL HEAT AND LIGHT COMPANY - - - - - - **P. C. 194**

10. —— *Quebec—Leases for Machines for Shoe Manufacture—Restrictive Condition as to User—Prohibition to use other than Machines leased by Plaintiff — Restraint of Trade — Alleged Misrepresentation — Election to treat Leases as Valid.*

By various leases in 1903 and 1904 the appellants leased to the respondents for twenty years machines made and used for certain processes in the manufacture of shoes, containing in each case a "tying clause," the effect of which was to prohibit the use by the respondents in the said manufacture of any machines not leased by

the appellants. Some additional leases were granted of other and allied machines to be used for certain ancillary processes in the same manufacture. These latter the respondents called upon the appellants to remove, but continued to work the former in conjunction with machines not leased to them by the appellants.

To an action for an injunction and damages the respondents pleaded that the appellants, by false representations that they were patentees in respect of their machines, had induced them to take the said leases ; and that the covenants therein, by reason of their unjust and oppressive nature and of the practical monopoly which the appellants had acquired in Canada in the manufacture and supply of shoemaking machinery, were in restraint of trade and void :—

Held, that as the respondents had not repudiated the leases after discovery of the alleged false representations, but had continued to work the demised machines and paid the royalties reserved, they had elected to treat the leases as subsisting, and could not afterwards avoid them. As the tying clauses merely prescribed the mode of user, and were not severable from the rest of the contracts, they could not be separately repudiated.

Held, further, that the covenants were not in restraint of trade. The shoe manufacturers of Canada were at liberty to hire or not to hire the appellants' machines on the appellants' terms as they pleased. The appellants were at liberty to prescribe the terms so long as they were not illegal, and were under no obligation to produce and dispose of their manufacture on terms similar to those imposed on patentees by the Canadian Patent Act. UNITED SHOE MACHINERY COMPANY OF CANADA *v.* BRUNET **P. C. 330**

11. —— **CAPE OF GOOD HOPE** — *Will — Institution of Heirs in specified Proportions—Tenant for Life—Other Proportions in certain Assets sold during the Life Tenancy—Period of Distribution—Construction of Will.*

The testator died in 1900, his brother and partner in 1906. Under the will in the events which happened the brother took a life interest in the entire residue of the testator's estate, the instituted heirs being himself as respects one fourth thereof and certain "other heirs" represented by some of the respondents as respects three fourths.

The institution was subject to the condition that the brother besides his life interest was entitled to retain during his life the testator's half share of the partnership assets ; distribution among the heirs being postponed till the brother's death, except in the case of a sale during his life, when the distribution of its proceeds was to be made at once, and if the sale was of partnership assets, in that case the shares should be altered to half and half.

The testator also directed that in order to avoid all disputes and differences an inventory and account should be made of his private estate and also of his firm, and that his "other heirs shall be paid out their three fourth shares in his private estate and one fourth share of his firm

PRIVY COUNCIL APPEALS—CAPE OF GOOD HOPE——*continued.*

on the valuations and accounts as set forth and contained in the said inventory, whenever such payment may be made to them, and they shall not be entitled to claim any profits or gains made by the brother should he continue to carry on the business, nor on the other hand shall such heirs be responsible for any losses" :—

Held, that on the true construction of this clause a partnership asset entered in the inventory but realized after the brother's death was distributable as regards the testator's moiety thereof in the proportion of three fourths and one fourth and not in the proportion of half and half. STEPHAN *v.* BOARD OF EXECUTORS. CAPE TOWN - - - - - **P. C. 347**

12. —— **CEYLON** — *Malicious Prosecution, Action for—Onus probandi—Law of Ceylon.*

Held, that under Roman-Dutch as well as English law a prosecution instituted without malice and with reasonable and probable cause does not amount to an act of aggression; that an animus injuriæ (malice) cannot be inferred from the mere fact that the prosecution has failed; and that the onus of proving malice rests on the plaintiff.

In an action for malicious prosecution against the respondent in that he had charged the appellant with theft, criminal trespass, and the forcible removal of his goods it appeared that the real charge was that of criminal trespass, that the conversion of the charge of removal of goods into that of theft was not done recklessly, that the respondent took action under legal advice in defence of his title to his property in the bona fide belief that the appellant had trespassed and forcibly removed his goods, and that there was no proof of indirect motive or malice of any kind on the respondent's part :—

Held, that the Appellate Court was right in reversing the District Judge's decree for damages, and that the appeal therefore must be dismissed. COREA *v.* PEIRIS - - - - - **P. C. 549**

13. —— *Ordinance No. 6 of 1847, s. 31—Marriage of Adulterers—Illegitimacy of Children procreated in Adultery—Law of Ceylon.*

Ceylon Ordinance No. 6 of 1847, s. 31, recognizes the marriage of adulterers, but denies legitimation to children procreated in adultery :—

Held, that a legacy by a Ceylon testator to his widow, who had previously lived with him as his mistress during the life of her first husband, is valid. So also is a legacy to her children born during the widow's former marriage where it is not shewn that they were the children of the testator. RABOT *v.* DE SILVA - - **P. C. 376**

14. —— **CHINA AND COREA**—*Shanghai—Shipping — Forfeiture of Ship, Decree of—Merchant Shipping Act*, 1894 (*57 & 58 Vict. c. 60*), *ss. 69, 76—Merchant Shipping Act*, 1906 (*6 Edw. 7, c. 48*), *s. 51—Supreme Court of China and Corea—Jurisdiction.*

The Supreme Court of China and Corea at Shanghai decreed the forfeiture for improperly carrying British colours of a ship owned by

PRIVY COUNCIL APPEALS—CHINA AND COREA—*continued.*

Russians which had been registered at Shanghai in the name of a British subject :—

Held, that as the Supreme Court at Shanghai was not within British territory it had no jurisdiction to make the decree. Sect. 76 of the Merchant Shipping Act, 1894, confers the jurisdiction exercised upon no Court except within the dominions of the Crown, and there is no statutory authority extending the jurisdiction thereunder to the Shanghai Court. OWNERS, &C., OF STEAMSHIP MAORI KING *v.* HIS BRITANNIC MAJESTY'S CONSUL-GENERAL AT SHANGHAI **P. C. 562**

15. —— **HONG KONG**—*Right of Appellants to shew Cause before Sentence—Hong Kong Supreme Court Ordinance*, 1873, *s. 31—Construction.*

The appellants, having been summarily committed to prison by the Chief Justice under Hong Kong Supreme Court Ordinance 3 of 1873, s. 31, for wilful and corrupt perjury before the Bankruptcy Court, moved unsuccessfully for a discharge of the order on the grounds that they had not been informed by the Chief Justice what statements made by them constituted the perjury and that they had had no opportunity of shewing cause before sentence.

Held, (1.) that the Ordinance did not contemplate the accusation being formulated in a series of specific allegations of perjury and that its gist had been made sufficiently clear; (2.) that as the Ordinance did not dispense with giving the appellants an opportunity before sentence of explaining or correcting misapprehensions of their statements, it was essential that it should be accorded to them.

In re Pollard, (1868) 5 Moo. P. C. (N.S.) 111; L. R. 2 P. C. 106, followed.

CHANG HANG KIU *v.* PIGGOTT. *In re* LAI HING FIRM - - - - - **P. C. 312**

16. —— **NEW SOUTH WALES**—*Conditional Purchaser cannot convert his Purchase after he has fulfilled his Conditions—Grant in Fee Simple—New South Wales Crown Lands Alienation Act*, 1861, *s. 21—Lands Act Amendment Act*, 1875, *s. 8.*

According to the true construction of New South Wales Crown Lands Alienation Act, 1861, its amendments, and regulations made thereunder, the words "conditional purchaser" in s. 21 mean a purchaser who purchased originally on certain conditions which have not been fulfilled. A purchaser who has fulfilled the conditions of his purchase is under s. 8 of the amending Act of 1875 the "rightful owner," and his purchase has ceased to be conditional although he has not obtained a grant in fee simple :—

Held, that the option given by Regulation 40, made under the said Acts, of converting a conditional purchase into a conditional purchase for mining purposes ceases on the fulfilment of all conditions and cannot be reserved indefinitely by delay in obtaining the grant in fee simple. CHIPPENDALL *v.* WILLIAM LAIDLEY & CO. **P. C. 199**

PRIVY COUNCIL APPEALS—NEW SOUTH WALES—*continued.*

17. —— *Public Service Act*, 1895, *s.* 60, *sub-s.* 1; *s.* 67—*Civil Service Act*, 1884, *s.* 46—*Construction — Compensation on Retirement — Law of New South Wales.*

Under the New South Wales Public Service Act, 1895, the plaintiff's services in the Bankruptcy Department as a member of the New South Wales Civil Service were dispensed with as from June 30, 1896, and he received under that Act a refund of his contribution to the Superannuation Account established by the Civil Service Act, 1884, and a gratuity as provided by s. 60, sub-s. 1, of the Act of 1895, and in addition a pension under the Public Service (Superanuation) Act, 1899.

In June, 1905, he sued for an increased pension on the ground that his services had been dispensed with in consequence of the abolition of his office and that he was entitled to the benefits in that case provided by the Act of 1884, s. 46:—

Held, that whether or not the plaintiff's retirement was "in consequence of the abolition of his office" within the meaning of that expression in the Act of 1884 it was incompetent for him to fall back upon that Act after having received the full compensation provided by s. 60 of the Act of 1895. All compensation other than that provided by the said Act was expressly excluded by s. 67 thereof. There was no grant or reservation to him of a right (if any) under the Act of 1884. WILLIAMS *v.* CURATOR OF INTESTATE ESTATES - - - **P. C. 353**

18. ——. *Will — Codicil — Construction — Period of Distribution.*

Where a testator gave an annuity to his widow till death or remarriage and created other fixed charges on his estate in favour of all his children during minority and of his daughters after attaining majority and directed that on his youngest child attaining majority his two sons if alive would become absolutely and indefeasibly entitled to the residue of his estate share and share alike:—

Held, that the period of distribution thus plainly indicated was not postponed by a codicil which directed that in case all his children died without issue his brother should take the whole residue and gave the trustee a discretionary power at any time to enhance the widow's annuity. As regards the discretion it appeared to have been exercised, and the widow appeared to have consented that no further enhancement should be made. HORDERN *v.* HORDERN **P. C. 210**

19. —— **NEW ZEALAND** — *Stamp Acts — Verbal Gift to Holder of a Power of Attorney — Deeds of Gift — Disposition of Property to evade Taxation—New Zealand Deceased Persons' Estates Duties Act*, 1881, *s.* 35.

The testator some years before his death executed a power of attorney in favour of his daughter, the respondent, and by a verbal gift, in order to escape taxation, authorized her to appropriate the purchase-moneys received thereunder of lands sold by him and of mortgage moneys due to him, to relend the latter to the mortgagors in her own name, and generally to invest his moneys in her own name:—

Held, that the gift to the respondent being verbal could not be stamped; that the deeds executed in carrying out the transaction of gift were not deeds of gift within the meaning of the New Zealand Stamp Acts, and did not operate a disposition of property within the meaning of s. 35 of New Zealand Deceased Persons' Estates Duties Act, 1881. MINISTER OF STAMPS *v.* TOWNEND - - - - - **P. C. 633**

PRIVY COUNCIL APPEALS—NEW ZEALAND—*continued.*

20. —— **NOVA SCOTIA**—*Contract to deliver on specified Terms all the Coal required for use in the Plaintiffs' Works—Construction—Suitable for Plaintiffs' Works — Reasonably free from Stone and Shale—Breach of Contract—Damages —Specific Performance.*

Under an agreement dated October 20, 1903, made between the appellant coal company and the respondent steel company (each theretofore well acquainted with the business of the other, and the character of the coal won) the former contracted to supply to the latter, on terms and conditions which were specified in great detail, "all the coal that the steel company may require for use in its works as hereinafter described," with the specific requirement that "all coal furnished shall be freshly mined and of the grade known as run-of-mine, reasonably free from stone and shale, and shall be supplied from such seams then being worked by the coal company as the steel company may designate." Other provisions imposed on the steel company the obligation to purchase all their coal from the coal company if the latter were ready to supply it, and gave the latter a preferential right to repurchase any excess delivery at less than the cost price. On November 9, 1906, the coal company notified to the steel company that the contract was at an end owing to their refusal to accept the coal furnished and to be furnished thereunder.

In a suit for a declaration that the coal company had no power to rescind, and for specific performance, or in the alternative for damages, the trial judge found, and their Lordships approved the finding—(1.) that the coal rejected was unfit for use by the steel company for its metallurgical purposes, i.e., the manufacture of steel, owing to the large quantity of sulphur it contained; (2.) that it was not reasonably free from stone and shale:—

Held that, on the true construction of the contract, "reasonably free from stone and shale" was irrespective of the method by which that result was obtained, and could not be so restricted as to mean as free from stone and shale as it could be made by reasonable and proper picking, and nothing more.

Held, further, that the above obligation to supply related to coal suitable in character for the plaintiffs' works to the extent that the same could be obtained by the reasonable and proper working of their mines. Those works were enumerated in great detail, not, as the terms of the contract and surrounding circumstances shewed, for the purpose of measuring the quantity required, but of specifying precisely

PRIVY COUNCIL APPEALS—NOVA SCOTIA —*continued.*

the uses to which the coal was to be put ; and the provision as to repurchase was inexplicable in the case of unsuitable coal.

Held, further, that the plaintiffs were not entitled to specific performance, but, owing to the defendants' wrongful repudiation of the contract, to recover damages for the loss of it, in addition to all damages incurred before repudiation. DOMINION COAL COMPANY, LIMITED *v.* DOMINION IRON AND STEEL COMPANY, LIMITED AND NATIONAL TRUST COMPANY, LIMITED - - - **P. C. 293**

—— **ONTARIO**—Laws of.
See Nos. 5—8, above.

—— **QUEBEC**—Laws of.
See Nos. 9, 10, above.

21. —— **QUEENSLAND** — *Rates — Queensland Local Authorities Act of* 1902, *ss.* 192 *and* 265—*Construction—General Rates—Application of General Rates levied in one Division to Construction of Works in another.*

Held, that according to the true construction of ss. 192 and 265 of the Queensland Local Authorities Act of 1902 the respondents (the council of the city of Brisbane being its duly constituted local authority) are not entitled to expend the produce of general rates levied upon the rateable lands in one division of their area upon works constructed in another, in the absence of a resolution under s. 265 declaring in the mode provided by that section that such works are general works and that their cost shall be defrayed out of general revenue.

In a suit by the appellant, as representing an association of ratepayers, for a declaration that in the absence of such resolution the balance of all general rates received in the several divisions, after deduction of all items chargeable to general revenue, shall be expended solely upon works within the respective limits thereof, the respondents claimed that they were authorized in their discretion to apply the whole of the general rates received by them upon any works within any division without regard to the actual amount of the general rates received by them in respect of any of the divisions :—

Held, that both contentions must be overruled. The effect of the sections is in the absence of such resolution to limit the power of expenditure upon works in a division to the amount of general rates received in it, but not to preclude the application of any unexpended balance thereof to the general purposes of the whole area. ATTORNEY-GENERAL FOR QUEENSLAND *v.* BRISBANE CITY COUNCIL - **P. C. 582**

22. —— **STRAITS SETTLEMENTS** — *Conviction of Master for Importation of Chandu — Onus probandi — Straits Settlements Opium Ordinance,* 1906, *s.* 73—*Construction.*

Held, on a consideration of the provisions of the Straits Settlements Opium Ordinance, 1906, that s. 73, which renders the importation of chandu a penal offence by the master and owner of the importing ship, applies to cases where

PRIVY COUNCIL APPEALS — STRAITS SETTLEMENTS—*continued.*

chandu is in fact imported, but the prosecution have not the means of proving by whose aid, assistance, or procurement, or with whose privity or consent, or in whose interest or for whose profit that was done.

Accordingly a conviction and fine thereunder of the appellant, master of the steamship *Devawongsee*, of importing chandu, where it was conceded that the owner, the appellant, and his chief officer were ignorant thereof, and the magistrate was satisfied that every precaution had been taken, were sustained in the absence of evidence that no other officers or servants or crew or other persons employed on the ship had not been implicated in the use of the ship for that purpose. BRUHN *v.* THE KING **P. C. 317**

23. —— *Settlement of Penang—Shipping—Bills of Lading — Cesser of Liability Clause — Construction — Delivery of Goods overside to Landing Agents.*

Goods were shipped on board the defendants' ship to be carried to Penang and delivered there to order or assigns under bills of lading which contained the condition that "in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." They were delivered to landing agents appointed by the defendants, and for that purpose had been discharged from the ship's tackle into lighters sent by the said agents, but by fraud, in which the said landing agents participated, never reached the consignees :—

Held, that although there had been no delivery under the bills of lading, yet the provision as to cesser of the defendants' liability directly the goods were "free of the ship's tackle" was perfectly clear, and that it must be held to be operative and effectual to protect them. CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA *v.* BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED - - - - **P. C. 369**

24. —— *Will, Construction of—Destination of the Subject of Void Gifts—Residuary Legatees —Next of Kin—Res judicata.*

The appellant petitioned to have it declared that the devise and gifts contained in the 6th clause of the testator's will were void, and that the lands comprised therein and the income thereof being undisposed of belonged to the testator's next of kin. It appeared that in 1872 the Court in a suit relating to the same will had declared the said gifts to be void and that they "fell into the undevised residue of the testator's estate" ; that thereafter the gifts which were of annual sums were paid to the testator's next of kin with the assent of all parties interested, and that in 1891 in another suit relating to the same clause the Court had declared that the defendants, who included the trustees of the will, were estopped from contending that the said annual sums were not wholly undisposed of :—

Held, overruling the judgment of the Court below, that the declaration of 1872 on its true

PRIVY COUNCIL APPEALS — STRAITS SETTLEMENTS—*continued.*
construction applied to the corpus of the property comprised in clause 6 and was not limited to the gifts of the annual sums and was res judicata against the claim of the respondents, the residuary legatees. BADAR BEE *v.* HABIB MERICAN NOORDIN - - - - P. C. 615

PROHIBITION—Mines and minerals—Lease - Construction clause against working adjoining minerals—Absolute prohibition - - - - - - - - 417
See MINE.

PUBLIC HEALTH—River, Pollution of—Sewer —Stream - - - - - - 45
See RIVER.

—— Tramroad—General district rate—Assessment - - - - - - - - 264
See RAILWAY. 5.

PURCHASER.
See under VENDOR AND PURCHASER.

QUEBEC—Laws of.
See PRIVY COUNCIL APPEALS. 9, 10.

QUEENSLAND—Laws of.
See PRIVY COUNCIL APPEALS. 21.

RAILWAY—"*Bridge*"—*Approaches*—*Public Carriage Road carried over Railway*—*Width of Bridge*—*Liability of Railway Company*—*Special Act*—*Construction*—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 50, 51.
In construing the proviso for widening a "bridge" in s. 51 of the Railways Clauses Consolidation Act, 1845, that section must be read with the group of sections of which s. 51 is part. So read "bridge" means the bridge proper and does not include the approaches to the bridge.
By the Taff Vale Railway Act, 1836, s. 69, where a bridge shall be erected for carrying a public highway over the railway, the road over the bridge must be formed and at all times continued of a width of not less than fifteen feet.
By the Taff Vale Railway Act, 1846, the provisions of the Act of 1836 were incorporated, except such as were inconsistent with (inter alia) the provisions of the Railways Clauses Consolidation Act, 1845.
A bridge carrying a public carriage road over the Taff Vale Railway was erected under the Act of 1846 of the width of eighteen feet. The average available width of the road having been afterwards increased beyond the width of the bridge on either side and to a width exceeding twenty-five feet, the railway company were required by the urban district council to widen the bridge and approaches in accordance with the provisions of ss. 50 and 51 of the Railways Clauses Consolidation Act, 1845:—
Held, that the obligations of the company were governed by ss. 50 and 51 of the Act of 1845, and not by the special Acts, and that the company were bound to widen the bridge proper to the width of twenty-five feet, but were not bound to widen the approaches to the bridge.
Decision of the Court of Appeal, [1908] 1 K. B. 239, reversed, and decision of Phillimore J., [1907] 1 K. B. 739, restored. RHONDDA URBAN COUNCIL *v.* TAFF VALE RAILWAY COMPANY H. L. (E.) 253

RAILWAY—*continued.*
2. —— *Fence*—*Railway Company*—*Defective Fence*—*Negligence*—*Turntable*—*Infant Trespasser*—*Invitation to Danger.*
A railway company kept a turntable unlocked (and therefore dangerous for children) on their land close to a public road. The company's servants knew that children were in the habit of trespassing and playing with the turntable, to which they obtained easy access through a well-worn gap in a fence which the railway company were bound by statute to maintain. A child between four and five years old playing with other children on the turntable having been seriously injured:—
Held, that there was evidence for a jury of actionable negligence on the part of the railway company.
The decision of the Irish Court of Appeal, [1908] 2 I. R. 242, reversed, and the judgment of Lord O'Brien C.J. and the decision of the King's Bench Division (Ireland) restored. COOKE *v.* MIDLAND GREAT WESTERN RAILWAY OF IRELAND - - - - - - H. L. (I.) 229

3. —— *Powers exercisable for Limited Period*—*Expiration of Time*—*Company in lawful Possession of Land*—*Power to construct Railway.*
A special Railway Act empowered the Great Western Railway Company to make railways and construct junctions between their line and the railways of the Midland Company, and provided that if the junctions were not completed within five years the powers granted should cease. The Great Western Company made the railways but had not completed the junctions before the end of the five years:—
Held, that there was nothing in the Act to prevent the Great Western Company from completing the junctions by virtue of their ownership of their own land and a licence to use the land of the Midland Company.
The decision of the Court of Appeal, sub nom. *Great Western Ry. Co.* v. *Midland Ry. Co.*, [1908] 2 Ch. 644, affirmed. MIDLAND RAILWAY COMPANY *v.* GREAT WESTERN RAILWAY COMPANY - - - - - - H. L. (E.) 445

4. —— *Powers, Extension of*—*Railway Company*—*Application of Assets*—*Construction of Extension Line*—*Creditors*—*Separate Undertaking.*
An existing railway company incorporated by statute was empowered by a later special Act to make extension railways, the railways and works and the land and property acquired for the extension to form a separate undertaking with separate capital, and as between the general and the separate undertaking the expenses of maintaining and working the separate undertaking to be paid out of the revenue of the separate undertaking. There being no provision either in the special Act or in the contract for

RAILWAY—*continued.*
constructing the extension to limit the liability of the company for the expenses of construction to the assets of the separate undertaking :—

Held by Lord Loreburn L.C. and Lord Macnaghten (Lord Ashbourne dissenting), that the contractors were entitled to be paid out of the general undertaking the sums due to them for the construction.

The decisions of the King's Bench Division and the Court of Appeal in Ireland (not reported) reversed.

In re Ogilvie, (1871) L. R. 7 Ch. 174, approved. S. Pearson & Son, Limited *v.* Dublin and South Eastern Railway Company H. L. (I.) 217

5. —— *Rates—Tramroad—Land "used only as a railway constructed under any Act of Parliament"—Local Government—General District Rate—Assessment—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*).

Where a tramroad has been constructed by a tramroad company under an Act of Parliament upon the company's land and the tramroad is in fact a railway and is used only as a railway constructed under an Act of Parliament for public conveyance, the company is entitled to be assessed in respect of the railway at one-fourth of its net annual value by virtue of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875.

Decision of the Court of Appeal, [1907] 1 K. B. 568, affirmed. Thornton Urban Council *v.* Blackpool and Fleetwood Tramroad Company- - - - - H. L. (E.) 264

6. —— *Siding Accommodation — Rates and Charges—"Such reasonable sum as the company may think fit in each case"—Reasonableness a Question for Jury—Provisional Order of Board of Trade—Midland Railway Company (Rates and Charges) Order Confirmation Act*, 1891 (54 & 55 *Vict. c. cxix.*).

The schedule of maximum rates and charges annexed to a provisional order of the Board of Trade with reference to the Midland Railway Company fixed as the minimum charge "for any accommodation or services rendered by the company within the scope of their undertaking by the desire of a trader and in respect of which no provisions are made by this schedule such reasonable sum as the company may think fit in each case."

The company gave notice to a trader that they would make a certain charge for waggons remaining on the company's "wait order sidings" beyond a specified time and sued for the charges :—

Held, that this was accommodation provided by the company within the scope of their undertaking within the meaning of the schedule, and that the reasonableness of the charges was a question of fact for a jury.

Decision of the Court of Appeal, [1908] 2 K. B. 356, affirmed. Midland Railway Company *v.* Myers, Rose & Co. - H. L. (E.) 13

—— Bridge carrying public highway over railway—Liability to maintain road - 138
See Scottish Law. 3.

RAILWAY—*continued.*
—— Canada Railway Act, 1903—Appeal - 624
See Privy Council Appeals. 5.

—— Map—Admissibility of railway map by the Appellate Court—Right of way - 361
See Privy Council Appeals. 3.

—— Passengers—Third-class passengers — Fare of a penny per mile - - - 325
See Privy Council Appeals. 2.

—— Rates—Link line — Actual net earnings within parish — Interest on cost of construction - - - - 78
See Rates. 2.

—— Stamp duty—Double duty — Transfer of powers, liabilities, and immunities to another railway company - - 1
See Revenue. 5.

—— Workmen's compensation—Engine driver 31
See Employer and Workman. 4.

RATES—*Appeal—Notice of Appeal—Notice to Assessment Committee—Entry and Respite of Appeal—Poor Rate—Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

Sect. 1 of the Union Assessment Committee Amendment Act, 1864, requires the appellant against a poor rate in certain cases to give to the union assessment committee "twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made."

The respondents gave the union assessment committee less than twenty-one days' notice previous to the quarter sessions next after the decision appealed against :—

Held, that the respondents were entitled at the said quarter sessions to enter continuances and respite the appeal to the next quarter sessions in accordance with the practice existing under previous statutes requiring similar notices.

Decision of the Court of Appeal, reported as *Rex* v. *West Riding of Yorkshire Justices*, [1908] 2 K. B. 635, affirmed. Denaby Parish Overseers *v.* Denaby and Cadeby Main Collieries, Limited - - H. L. (E.) 247

2. —— *Railway — Link Line—Actual Net Earnings within Parish—Interest on Cost of Construction — Profits made outside Parish — Rateable Value, Test of—Rent "reasonably" to be expected—Poor Rate—Parochial Assessment Act*, 1836 (6 & 7 *Will.* 4. *c.* 96), *s.* 1.

In assessing the rateable value of a section of a railway link line within a parish the cost of construction of the link line, which connects two great systems, is not as a matter of fact and business experience a measure of the rent at which that section of the line may reasonably be expected to let within the meaning of the Parochial Assessment Act, 1836, and evidence of the interest on the cost of construction is not admissible.

The Act in speaking of a rent at which a hereditament may "reasonably" be expected to

RATES—*continued.*
let excludes the idea of an oppressive demand fixed upon imagined necessities.

Decision of the Court of Appeal in the *Banbury Case*, [1907] 1 K. B. 717, reversed, and decision of the King's Bench Division, [1906] 1 K. B. 597, restored.

Decision of the Court of Appeal in the *Sheffield Case*, [1908] 1 K. B. 750, reversed as a corollary of the Banbury decision, and decision of the King's Bench Division restored. GREAT CENTRAL RAILWAY COMPANY *v.* BANBURY UNION. SHEFFIELD UNION *v.* GREAT CENTRAL RAILWAY COMPANY - - **H. L. (E.) 78**

3. —— *Rent-Charges imposed for Protection of Land from Sea—Poor Rate—Rateable Value—Necessary Expenses to command Rent—Parochial Assessment Act*, 1836 (6 *&* 7 *Will.* 4, *c.* 96), *s.* 1.

In a district under the statutory jurisdiction of commissioners of sewers rent-charges were imposed on lands A and B for the maintenance of works necessary to protect the district from incursions of the sea. Some of the lands within the district shared the benefits of this protection, though they were not liable to, and did not contribute towards, the maintenance of the works :—

Held, that upon assessing to the poor rate the tenants of lands A and B they were entitled to a deduction from the rateable value in respect of the rent-charge, or such proportion thereof as was the proper share of lands A and B respectively, on the footing that all the protected lands were taken to contribute rateably having regard to the protection they received.

Decisions of the King's Bench Division, [1906] 2 K. B. 147, and the Court of Appeal, [1907] 2 K. B. 460, reversed. GREEN *v.* NEWPORT UNION. STEAD *v.* NEWPORT UNION **H. L. (E.) 35**

—— Queensland Local Authorities Act—Construction - - - - - - **582**
See PRIVY COUNCIL APPEALS. 21.

—— Railway—Rates and charges—Reasonableness a question for jury - - - **13**
See RAILWAY. 6.

—— Tramroad—General district rate—Assessment—Land "used only as a railway constructed under any Act of Parliament" - - - - - - - **264**
See RAILWAY. 5.

—— Shipping—Dock rates, Exemption from—Lighter—London and St. Katherine Docks Act - - - - - - **25**
See SHIPPING. 3.

—— Shipping—Dock rates, Exemption from—Lighter—West India Docks Act - **15**
See SHIPPING. 2.

REAL PROPERTY ACT, 1845 — Subsidence, Compensation for — Mining lease — Covenant running with the land - **98**
See COVENANT.

REDUCTION — Will — Suspicion — Defect in attestation - - - - - - **278**
See SCOTTISH LAW. 4.

REMOTENESS—Will—Perpetuity — Executory limitation—Contingency - - **275**
See WILL.

RENT — Rates — Railway — Link line — Rent "reasonably" to be expected - **78**
See RATES. 2.

RENT-CHARGE—Rates—Rent-charges imposed for protection of land from sea - **35**
See RATES. 3.

REPRESENTATION OF THE PEOPLE (SCOTLAND) ACT, 1868 - - - **147**
See SCOTTISH LAW. 2.

RESIDUE—Residuary legatees—Will, Construction of—Destination of the subject of void gifts—Next of kin—Res judicata **615**
See PRIVY COUNCIL APPEALS. 24.

—— Will, Construction of—Testator's children to take equal shares in the residue at majority — Accumulations of income during minority of donee - - **570**
See PRIVY COUNCIL APPEALS. 8.

RES JUDICATA—Will, Construction of—Destination of the subject of void gifts—Residuary legatees — Next of kin — Appeal from the Straits Settlements **615**
See PRIVY COUNCIL APPEALS. 24.

RESTRAINT OF TRADE—Leases of machines for shoe manufacture—Restrictive condition as to user - - - - **330**
See PRIVY COUNCIL APPEALS. 10.

RETIREMENT—Compensation—Civil Service **353**
See PRIVY COUNCIL APPEALS. 17.

REVENUE — *Estate Duty — Incumbrances — Bona fide Creation — Consideration—"Wholly for the deceased's own use and benefit"—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7, *sub-s.* 1 (*a*).

R., institute of entail in possession of estates in Scotland, without the consent of his son and grandson (the next two heirs of entail) disentailed the estates, acquired the fee simple under the Scotch Entail Acts, and secured to the satisfaction of the Court the ascertained values of the respective interests of his son and grandson by bonds in their favour charged on the fee simple. By later bonds he charged the fee simple with interest due on the first bonds. A desire to lessen the estate duties payable on his death was R.'s motive in these transactions, but they were all open, straightforward, and genuine, not fictitious or colourable. Upon R.'s death :—

Held by Lord Loreburn L.C. and Lords Macnaghten and Atkinson (Lords Collins and Shaw of Dunfermline dissenting), that the bonds were incumbrances created bona fide for full consideration in money or money's worth wholly for R.'s own use and benefit and took effect out of his interest within s. 7, sub-s. 1 (*a*), of the

Finance Act, 1894; and that deductions accordingly ought to be allowed in assessing the estate duties.

The decisions of Bray J., [1907] 2 K. B. 923, and the Court of Appeal, [1908] 2 K. B. 729, affirmed. ATTORNEY-GENERAL *v.* DUKE OF RICHMOND AND GORDON - - **H. L. (E.) 466**

2. —— *Income Tax—Office or Employment of Profit—Incumbent of Benefice—Profits accruing by reason of Office—Easter Offerings—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146; *Sched. E, rr.* 1—4.

Voluntary Easter offerings of money given as a freewill gift to the incumbent of a benefice as such for his personal use are, if given for the purpose of increasing his stipend, assessable to income tax as "profits accruing to him by reason of his office" under Sched. E, r. 1, of the Income Tax Act, 1842.

Decision of the Court of Appeal sub nom. *Cooper* v. *Blakiston*, [1907] 2 K. B. 688, affirmed. BLAKISTON *v.* COOPER - - **H. L. (E.) 104**

3. —— *Stamp — Settlement — Alteration of Security by subsequent Deed—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 62; *First Schedule.*

In the First Schedule to the Stamp Act, 1891, "settlement," defined as "any instrument . . . . whereby any definite and certain principal sum of money . . . . or any definite and certain amount of stock or any security is settled or agreed to be settled in any manner whatsoever," is made liable to ad valorem stamp duty.

By an ante-nuptial contract of marriage A. bound himself in the event of his wife surviving him to pay to her an annuity of 400*l.*, and in security of the said annuity A. bound himself and his heirs to infeft his wife in certain lands. The contract of marriage was impressed with a stamp duty and was adjudicated as duly stamped. Subsequently A. desired to sell the lands forming the security, and his wife agreed to consent to the sale on condition that the annuity was otherwise secured; accordingly A. in place of the said security executed a deed by which he conveyed to trustees certain lands, certain policies of assurance, and a sum of money for (inter alia) the payment of the annuity provided to the wife in her marriage contract. The Crown claimed that the deed of trust was chargeable with an ad valorem stamp duty as being a "settlement":—

Held (affirming the decision of the First Division of the Court of Session, (1909) S. C. 248), that the deed was not a "settlement" under the Stamp Act, 1891. INLAND REVENUE *v.* OLIVER - - - - - **H. L. (Sc.) 427**

4. —— *Stamp Duty—Company—Consolidation of Debenture Stock—Issue of Loan Capital —Finance Act*, 1899 (62 *&* 63 *Vict. c.* 9), *s.* 8.

Under the powers of their special Act a company incorporated in the United Kingdom "modified the rights" of the holders of their existing debenture stock (which bore interest at 4 per cent.) by dividing it into two classes of debenture stock, A and B, in certain proportions, called in and cancelled the certificates of the existing stock, and gave to the holders certificates

of the new A and B stock (which bore interest at 3 per cent.) in such amounts as to give to each holder interest equivalent to his former interest. The interest on the B stock ranked next after the interest on the A stock:—

Held, that this was an "issue of debenture stock" within the meaning of the Finance Act, 1899, s. 8, and that the company were liable to the duties imposed by the Act. LONDON AND INDIA DOCKS COMPANY *v.* ATTORNEY-GENERAL - - - - - **H. L. (E.) 7**

5. —— *Stamp Duty—Company with Liability limited otherwise than by Registration—Increase of Amount of Nominal Share Capital authorized by Act—Transfer of Powers, Liabilities, and Immunities to another Railway Company — Double Duty—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 113.

The G. Railway Company was incorporated by an Act of Parliament in 1899 with a capital of 2,400,000*l.*, and duly paid the duty thereon under the Stamp Act, 1891. The B. Railway Company was incorporated by an Act of 1897 with a capital of 600,000*l.*, and duly paid the duty thereon under the Act of 1891. By an Act of 1902 all the powers, rights, privileges, liabilities, and immunities of the G. Railway Company were transferred to the B. Railway Company, and the G. Railway Company was dissolved:—

Held, that by the transfer there was "an increase of the amount of nominal share capital of the B. Company authorized by" the Act of 1902 to the extent of 2,400,000*l.*, and that the duty thereon must be paid by the B. Railway Company, under the Stamp Act, 1891. GREAT NORTHERN, PICCADILLY AND BROMPTON RAILWAY COMPANY *v.* ATTORNEY-GENERAL **H. L. (E.) 1**

6. —— *Succession Duty — Entail — Propulsion of Fee—"Acceleration" of Succession—Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *ss.* 2, 15.

By s. 15 of the Succession Duty Act, 1853, "Where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place."

The late Earl of Buchan being in 1872 heir of entail in possession of certain entailed estates in Scotland under an entail prior to 1848, the appellant, who was his eldest son and heir apparent, agreed with his father to propel the entailed estates so that the appellant should enjoy them as from September 13, 1871. The father and son thereupon executed a disposition of the entailed estates, and the father's interest therein ceased. But inasmuch as the estate could not be disentailed until the appellant attained the age of twenty-five years, it was further agreed that when the appellant attained that age the estates should be disentailed. This was done in 1875. The appellant also undertook to raise a large sum of money on the estates to pay off the debts of the Earl of Buchan. In 1898 the late Earl of Buchan died, some years after he had ceased to be owner of the entailed

REVENUE—*continued.*
estates. The Crown claimed succession duty under ss. 2 and 15 of the Succession Duty Act of 1853, founding their claim on the ground that under the original deed of entail of 1664 the appellant had an expectant right of succession, and this right would open to him by devolution on the death of the late Earl of Buchan, his father, and the transaction above referred to, by which there was a propulsion of the estates to the next heir, namely, the appellant, was an acceleration of the succession :—

Held (affirming the decision of the First Division of the Court of Session, (1907) S. C. 849), that succession duty was payable by the appellant under s. 15 of the Act on the ground that he had a title to the succession capable of being "accelerated," and that title had been accelerated by the surrender or extinction of the father's prior interest. EARL OF BUCHAN *v.* LORD ADVOCATE - - - **H. L. (Sc.) 166**

—— New Zealand Deceased Persons' Estates Duties Act, 1881—Stamp Acts - **633**
See PRIVY COUNCIL APPEALS. 19.

RIVER—*Pollution of River—Sewer—Person who causes polluting Liquid to flow into Stream—Local Government — Public Health — Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 7.

Manufacturers caused polluting liquid to flow from their factory into a sewer which discharged into a stream. The sewer existed at the date of the passing of the Rivers Pollution Prevention Act, 1876, and was vested in and under the control of the local sanitary authority. The manufacturers used no means to render the polluting liquid harmless :—

Held that, even assuming that there was a prescriptive right to discharge their polluting liquid into the sewer, the manufacturers had committed an offence under s. 4 of the Act by discharging into a sewer through which the liquid found its way into the stream.

The reasoning in *Kirkheaton Local Board* v. *Ainley*, [1892] 2 Q. B. 274, approved upon this point. BUTTERWORTH *v.* WEST RIDING OF YORKSHIRE RIVERS BOARD - **H. L. (E.) 45**

—— Rivers pollution prevention—Facilities for carrying off liquids from factories **438**
See SEWERS.

RIVERS POLLUTION PREVENTION ACT, 1876 - - - - - - - **45**
See RIVER.

ROAD.
See under HIGHWAY.

SCOTTISH LAW—*Lease—Power of Heir of Entail in Possession to burden the Estate—Obligation to take over Sheep Stock on Expiration of Lease—Custom.*

The appellant was tenant of a sheep farm forming part of an entailed estate in Scotland. The lease granted by the late heir of entail was for fifteen years from Whit Sunday, 1903, with an option to either party to terminate the lease at the end of the fifth year. The appellant at his entry upon the farm was required to take over the sheep stock from the outgoing tenant at a valuation, and the lease contained the following clause :—The tenant "shall deliver at the end of the lease to the landlord or incoming tenant as far as possible not more than the same number of sheep and the same classes as he receives on his entry and the proprietor agrees that the" tenant "or his representatives shall receive the same prices as he paid on his entry." The appellant paid to the outgoing tenant 1319*l.* in 1903. In 1907 the late heir of entail in possession died and the respondent succeeded to the estate as next heir of entail. After her succession she repudiated the obligation to take over the sheep, and on the appellant not acquiescing she gave notice to terminate the lease on Whit Sunday, 1908. The appellant then raised this action concluding for declarator that the obligation was binding on the respondent as heiress of entail. The respondent did not represent the grantor of the lease, nor was she liable for his debts :—

Held (affirming the decision of the First Division of the Court of Session, (1908) S. C. 628), that the respondent was not liable under the obligation, as no heir of entail can be liable to pay a debt of a previous heir which has not been made a charge upon the estate itself and which is not authorized by the deed of entail. GILLESPIE *v.* RIDDELL - - **H. L. (Sc.) 130**

2. —— *Parliament — Franchise — Right of Women Graduates to vote — Representation of the People (Scotland) Act*, 1868 (31 & 32 *Vict. c.* 48), *ss.* 27, 28—*Universities Elections Amendment (Scotland) Act*, 1881 (44 & 45 *Vict. c.* 40), *s.* 2, *sub-ss.* 3, 10, 16—*Universities (Scotland) Act*, 1889 (52 & 53 *Vict. c.* 55), *s.* 14, *sub-s.* 6.

By s. 27 of the Representation of the People (Scotland) Act, 1868, "Every person whose name is for the time being on the register . . . . of the general council of such university shall, if of full age and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university in terms of this Act"; and by s. 28, sub-s. 2, the following persons shall be members of the general council of the respective universities : "All persons on whom the university to which such general council belongs has after examination conferred" certain degrees, "or any other degree that may hereafter be instituted." The appellants were five women graduates of the University of Edinburgh, and as such had their names enrolled on the general council of that university, and they claimed as graduates and members of the general council the right to vote at the election of a member of Parliament for the university :—

Held (affirming the decision of the Extra Division of the Court of Session, (1908) S. C. 113), that the appellants were not entitled to vote in the election of the parliamentary representative of the university.

There is no evidence of any ancient custom for women to vote in parliamentary elections. NAIRN *v.* UNIVERSITY OF ST. ANDREWS **H. L. (Sc.) 147**

SCOTTISH LAW—*continued.*

3. —— *Railway—Bridge carrying Public Highway over Railway—Liability to maintain Road—Glasgow Police Act*, 1866 (29 & 30 *Vict. c. cclxxiii.*), *ss.* 310, 316—*City of Glasgow Act*, 1891 (54 & 55 *Vict. c. cxxx.*), *s.* 35—*Railways Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 33), *s.* 39—*Caledonian Railway (Additional Powers) Act*, 1872 (35 & 36 *Vict. c. cxiv.*), *ss.* 4, 26.

By s. 39 of the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), "If the line of the railway cross any turnpike road or public highway . . . . either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge . . . . and such bridge with the immediate approaches and all other necessary works connected therewith shall be executed and at all times thereafter maintained at the expense of the company." In 1898 two streets, B. and C., previously forming part of the county district, were with other areas included within the boundaries of the city of Glasgow. A third street, S., was declared a public street in 1894. Prior to 1899 parts of these streets were carried over railways belonging to the appellants by means of bridges which were constructed by the appellants. The city of Glasgow claimed that the roadways of these three streets over the bridges and the approaches thereto fell to be maintained and repaired by the appellants. B. and C. had been respectively a statute labour road and a turnpike road, and S. had been a private occupation road. The appellants contended that the section only applied to county roads and not to streets in a town:—

Held (affirming the decision of the First Division of the Court of Session, (1906) 8 F. 755; (1908) S. C. 244), that B. and C. were public highways, and therefore the appellants were bound to maintain the roadways where they crossed their railway, and the approaches to the bridges; but that as to S., it being proved that it was a private street when the appellants' railway bridge was constructed, the appellants were not bound to maintain the roadway. CALEDONIAN RAILWAY COMPANY *v.* GLASGOW CORPORATION - - - - **H. L. (Sc.) 13**

4. —— *Will—Reduction—Agent alleged to benefit under Will prepared by him—Suspicion—Defect in Attestation.*

The rule that where a will is prepared by a party who takes a benefit under it, that is a circumstance which forms a just ground of suspicion and requires clear and satisfactory proof that the instrument contains the real intention of the testator, does not authorize the Court to consider suggestions of fraud or undue influence of which no foundation is laid in evidence.

Decision of the First Division of the Court of Session, Scotland, (1907) S. C. 1240, affirmed. LOW *v.* GUTHRIE - - - **H. L. (Sc.) 278**

—— Insurance (Accident)—Condition in policy—Claim to be made within a year of registration - - - - - **404**
See INSURANCE (ACCIDENT).

SCOTTISH LAW—*continued.*

—— Mines and minerals—Lease—Absolute prohibition - - - - - - **417**
See MINE.

—— Stamp—Settlement—Alteration of security by subsequent deed - - - **427**
See REVENUE. 3.

—— Workmen's compensation—Maxim "Actio personalis moritur cum persona" - **383**
See EMPLOYER AND WORKMAN. 2.

—— Workmen's compensation — Refusal of sheriff to state a case—Appeal—Competency - - - - - - **523**
See EMPLOYER AND WORKMAN. 5.

SEA—Rates—Rent-charges imposed for protection of land from sea - - - **35**
See RATES. 3.

SENTENCE—Right of appellants to shew cause before sentence — Appeal from Hong Kong - - - - - - - **312**
See PRIVY COUNCIL APPEALS. 15.

SERVANT—Master and.
See under MASTER AND SERVANT.

SET-OFF—Exchequer Court of Canada (Admiralty)—Extent of jurisdiction—Suit to enforce mortgage of a ship—Plea of set-off - - - - - - **597**
See PRIVY COUNCIL APPEALS. 4.

SETTLEMENT—Stamp—Alteration of security by subsequent deed - - - **427**
See REVENUE. 3.

SEWERS—*Facilities for carrying off Liquids from Factories—Local Government—"Sewers"—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

The facilities required by s. 7 of the Rivers Pollution Prevention Act, 1876, to be given for carrying liquids from factories or manufacturing processes into sewers under the control of a local authority cannot be enforced where, though the pipes are capable of carrying the liquids, the works for purification are not sufficient to deal with the liquids in addition to the sewage within the district. The word "sewers" in the second proviso of s. 7 includes not merely the pipes, but the works for purification of the sewage.

Decision of the Court of Appeal, [1908] 2 K. B. 780, affirmed. BROOK *v.* MELTHAM URBAN DISTRICT COUNCIL - - - **H. L. (E.) 438**

—— River, Pollution of—Person who causes polluting liquid to flow into stream **45**
See RIVER.

SHANGHAI—China and Corea—Law of - **562**
See PRIVY COUNCIL APPEALS. 14.

SHEEP—Lease—Obligation to take over sheep stock on expiration of lease — Custom - - - - - - - **130**
See SCOTTISH LAW. 1.

SHERIFF—Workmen's compensation—Refusal of sheriff to state a case - - **523**
See EMPLOYER AND WORKMAN. 5.

SHIPPING—*Bill of Lading—Exceptions and Conditions — Damage to Cargo — Seaworthiness —Negligence of Shipowners.*

The decision of the Court of Appeal, [1909] P. 93, reversed upon the ground that the *Schwan* was as a matter of fact not seaworthy owing to a defect in a three-way cock which allowed the sea to run into the hold, and that the shipowners' engineer had as a matter of fact not exercised reasonable care and diligence in connection with the ship, her tackle, machinery and appurtenances.

The decision of Bargrave Deane J., [1908] P. 356, restored upon the above ground. ABRAM LYLE & SONS *v.* OWNERS OF STEAMSHIP SCHWAN. THE SCHWAN - - **H. L. (E.) 450**

2. —— *Dock Company — Ship — Exemption from Dock Rates—Lighter—"Bona fide engaged in discharging or receiving Goods to or from on board of a Ship" — West India Docks Act,* 1831 (1 *&* 2 *Will.* 4, *c. lii.*), *s.* 83.

By s. 83 of the West India Docks Act it was enacted that "all lighters and craft entering into the said docks, basins, locks or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates so long as such lighter or craft shall be bona fide engaged in discharging or receiving such ballast or goods as aforesaid, and also all such ballast or goods so discharged or received shall be exempt from any rate or charge whatever." Sect. 76 gave the dock company power to take in respect of every lighter, barge, or craft entering into any of the docks such reasonable rate (not exceeding a specified amount) as the directors should from time to time appoint.

Two lighters entered the docks with goods for the purpose of discharging them into a vessel lying in the docks, but, owing to the vessel being unable from want of space to receive the goods, left the docks without being able to discharge :—

Held by Lord Loreburn L. C. and Lords Macnaghten, Robertson, and Collins (Lords Ashbourne and Atkinson dissenting), that according to the true construction of s. 83 the lighters were not exempt from the payment of rates.

Decision of the Court of Appeal, [1908] 1 K. B. 786, reversed. LONDON AND INDIA DOCKS COMPANY *v.* THAMES STEAM TUG AND LIGHTERAGE COMPANY - - **H. L. (E.) 15**

3. —— *Dock Company — Ship — Exemption from Dock Rates—Lighter—"Bona fide engaged in so discharging or receiving Goods or Ballast to or from on board of any Ship or Vessel lying therein"—London and St. Katherine Docks Act,* 1864 (27 *&* 28 *Vict. c. clxxviii.*), *s.* 136.

By the London and St. Katherine Docks Act, 1864, c. clxxviii., s. 136, lighters entering the docks to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates so long as the lighter is bona fide engaged in so discharging or receiving the ballast or goods.

SHIPPING—*continued.*

Under this section a lighter is engaged in discharging or receiving not merely while the goods are being removed, but also during her entrance to the dock, her departure from it, and any other operation reasonably required in order that she may discharge or receive. But she is not exempt if she is in the dock when her presence is not reasonably necessary for the operations.

Decisions of the Court of Appeal, [1908] 2 K. B. 175, reversed. LONDON AND INDIA DOCKS COMPANY *v.* MCDOUGALL & BONTHRON, LIMITED. LONDON AND INDIA DOCKS COMPANY *v.* PAGE, SON & EAST, LIMITED **H. L. (E.) 25**

—— Bills of lading—Cesser of liability clause—Delivery of goods overside to landing agents - - - - - - **369**
See PRIVY COUNCIL APPEALS. 23.

—— Canada — Exchequer Court of Canada (Admiralty)—Extent of jurisdiction—Suit to enforce mortgage of a ship **597**
See PRIVY COUNCIL APPEALS. 4.

—— Forfeiture of ship, Decree of—Supreme Court of China and Corea—Jurisdiction - - - - - - - **562**
See PRIVY COUNCIL APPEALS. 14.

SHOE—Leases of machines for shoe manufacture —Restrictive condition as to user — Restraint of trade - - - **330**
See PRIVY COUNCIL APPEALS. 10.

SIDING ACCOMMODATION—Rates and charges —Reasonableness a question for jury **13**
See RAILWAY. 6.

SPECIFIC PERFORMANCE—Contract to deliver on specified terms all the coal required for use in the plaintiffs' works—Breach of contract—Damages - - **293**
See PRIVY COUNCIL APPEALS. 20.

SPECIFICATION—Interpretation of—Infringement by licensee—Damages - **285**
See PATENT.

STAMP DUTY.
See under REVENUE.

STATUTE—Dominion overrides Provincial legislation—Laws of Canada - - **194**
See PRIVY COUNCIL APPEALS. 9.

STATUTES :—

I. IMPERIAL STATUTES.

1831.

1 & 2 Will. 4, c. lii., s. 83 — *West India Docks* - - - - - - - - **15**
See SHIPPING. 2.

1836.

6 & 7 Will. 4, c. 96, s. 1—*Parochial Assessment* - - - - - **35, 78**
See RATES. 2, 3.

STATUTES—*continued.*

1842.

5 & 6 Vict. c. 35, s. 146; Sched. E, rr. 1—4—*Income Tax* - - - - 104
See REVENUE. 2.

1844.

7 & 8 Vict. c. 101, s. 64—*Poor Law Amendment* - - - - - - 57
See POOR LAW.

1845.

8 & 9 Vict. c. 20, ss. 50, 51—*Railways Clauses Consolidation* - - - - 253
See RAILWAY. 1.

—— c. 33, s. 39 — *Railways Clauses Consolidation—Scotland* - - - 138
See SCOTTISH LAW. 3.

—— c. 106, s. 5—*Real Property* - 98
See COVENANT.

1853.

16 & 17 Vict. c. 51, ss. 2, 15 — *Succession Duty* - - - - - - 166
See REVENUE. 6.

1858.

21 & 22 Vict. c. 72, ss. 61, 85—*Incumbered Estates Court—Ireland* - - 64
See IRISH LAW.

1864.

27 & 28 Vict. c. 39, s. 1—*Union Assessment Committee Amendment* - - - 247
See RATES. 1.

—— c. clxxviii., s. 136 — *London and St. Katherine Docks* - - - - 25
See SHIPPING. 3.

1866.

29 & 30 Vict. c. cclxxiii., ss. 310, 316—*Glasgow Police* - - - - - - 138
See SCOTTISH LAW. 3.

1868.

31 & 32 Vict. c. 48, ss. 27, 28—*Representation of the People—Scotland* - - 147
See SCOTTISH LAW 2.

1869.

32 & 33 Vict. c. 73, s. 5—*Telegraph* - 269
See TELEGRAPH.

1872.

35 & 36 Vict. c. cxiv., ss. 4, 26—*Caledonian Railway—Additional Powers* - 138
See SCOTTISH LAW. 3.

1875.

38 & 39 Vict. c. 55, s. 211, sub-s. 1 (*b*)—*Public Health* - - - - 264
See RAILWAY. 5.

1876.

39 & 40 Vict. c. 61, s. 11—*Divided Parishes and Poor Law Amendment* - - 57
See POOR LAW.

STATUTES—*continued.*

39 & 40 Vict. c. 75, ss. 4, 7—*Rivers Pollution Prevention* - - - - - 45
See RIVER.

—— —— s. 7 - - - - - - 438
See SEWERS.

1878.

41 & 42 Vict. c. 31, s. 4—*Bills of Sale* - 109
See BILL OF SALE.

1881.

44 & 45 Vict. c. 40, s. 2, sub-ss. 3, 10, 16—*Universities Elections Amendment—Scotland* - - - - - - 147
See SCOTTISH LAW. 2.

—— c. 41, s. 58, sub-s. 1—*Conveyancing and Law of Property* - - - - 98
See COVENANT.

1887.

50 & 51 Vict. c. 58, ss. 49, 51, 52; r. 3—*Coal Mines Regulation* - - - - 123
See EMPLOYER AND WORKMAN. 6.

1889.

52 & 53 Vict. c. 55, s. 14, sub-s. 6—*Universities—Scotland* - - - - 147
See SCOTTISH LAW. 2.

1891.

54 & 55 Vict. c. 39, s. 62; First Schedule—*Stamps* - - - - - - 427
See REVENUE. 3.

—— —— s. 113 - - - - - - 1
See REVENUE. 5.

—— c. cxxx., s. 35—*City of Glasgow* - 138
See SCOTTISH LAW. 3.

—— c. ccxix.—*Midland Railway Company (Rates and Charges) Order Confirmation* - - - - - - - 13
See RAILWAY. 6.

1894.

57 & 58 Vict. c. 30, s. 7, sub-s. 1 (*a*)—*Finance* - - - - - - 466
See REVENUE. 1.

—— c. 60, ss. 69, 76—*Merchant Shipping* - 562
See PRIVY COUNCIL APPEALS. 14.

1897.

60 & 61 Vict. c. 37, s. 1—*Workmen's Compensation* - - - - - 31
See EMPLOYER AND WORKMAN. 4.

1899.

62 & 63 Vict. c. 9, s. 8—*Finance* - - 7
See REVENUE. 4.

1906.

6 Edw. 7, c. 47, s. 3; s. 5, sub-s. 3—*Trade Disputes* - - - - - - 506
See TRADE UNION.

—— c. 48, s. 51—*Merchant Shipping* - 562
See PRIVY COUNCIL APPEALS, 14.

STATUTES—*continued.*
6 Edw. 7, c. 58, s. 1, sub-s. 1—*Workmen's Compensation* - - - - - 523
See EMPLOYER AND WORKMAN. 5.
—— —— s. 1, sub-ss. 1, 2, and Sched. I., s. 1, sub-s. (*a*) (i.) - - - - - 383
See EMPLOYER AND WORKMAN. 2.
—— —— s. 1, sub-s. 2 (*c*) - - - 123
See EMPLOYER AND WORKMAN. 6.
—— —— ss. 1, 13 - - - - - 433
See EMPLOYER AND WORKMAN. 3.
—— —— Sched. I., ss. 1, 2 - - - 435
See EMPLOYER AND WORKMAN. 1.

II. COLONIAL STATUTES.

Australia, Statutes of:
Civil Service Act, 1884, s. 46 - - - 353
See PRIVY COUNCIL APPEALS. 17.
Public Service Act, 1895, s. 60, sub-s. 1; s. 67 - - - - - - 353
See PRIVY COUNCIL APPEALS. 17.
Australian Commonwealth Constitution Act, 1900, s. 74 - - - - 345
See PRIVY COUNCIL APPEALS. 1.
Queensland Local Authorities Act of 1902, ss. 192, 265 - - - - - 582
See PRIVY COUNCIL APPEALS. 21.

Canada, Statutes of:
Province of Canada, 16 Vict. c. 37, s. 3 - 325
See PRIVY COUNCIL APPEALS. 2.
Admiralty Court Act, 1861 (Imperial), s. 11 - - - - - - - 597
See PRIVY COUNCIL APPEALS. 4.
Supreme and Exchequer Courts Act, R. S. C., 1886, c. 135, s. 26 - - 624
See PRIVY COUNCIL APPEALS. 5.
Railway Act, 1888, s. 134 - - - 361
See PRIVY COUNCIL APPEALS. 3.
Dominion Act, 60 & 61 Vict. c. 72 - - 194
See PRIVY COUNCIL APPEALS. 9.
Canada Railway Act, 1903, s. 168 - - 624
See PRIVY COUNCIL APPEALS. 5.
Railway Act, 1903, ss. 128, 239 - - 361
See PRIVY COUNCIL APPEALS. 3.
Quebec Act (4 Edw. 7, c. 84), s. 3 - - 194
See PRIVY COUNCIL APPEALS. 9.
Dominion Railway Act, 1906 (6 Edw. 7, c. 42) - - - - - - - 325
See PRIVY COUNCIL APPEALS. 2.

Ceylon, Statutes of:
Ordinance, No. 6 of 1847, s. 31 - - 376
See PRIVY COUNCIL APPEALS. 13.

Hong Kong, Statutes of:
Hong Kong Supreme Court Ordinance, 1873, s. 31 - - - - - - 312
See PRIVY COUNCIL APPEALS. 15.

New South Wales, Statutes of:
New South Wales Crown Lands Alienation Act, 1861, s. 21 - - - 199
See PRIVY COUNCIL APPEALS. 16.

STATUTES—*continued.*
Lands Act Amendment Act, 1875, s. 8 - 199
See PRIVY COUNCIL APPEALS. 16.

New Zealand, Statutes of:
New Zealand Deceased Persons' Estates Duties Act, 1881, s. 35 - - - 633
See PRIVY COUNCIL APPEALS. 19.

Straits Settlements, Statutes of:
Straits Settlements Opium Ordinance, 1906, s. 73 - - - - - - 317
See PRIVY COUNCIL APPEALS. 22.

STRAITS SETTLEMENTS—Laws of.
See PRIVY COUNCIL APPEALS. 22—24.
—— Settlement of Penang—Laws of.
See PRIVY COUNCIL APPEALS. 23, 24.

STREAM.
See under RIVER.

SUBSIDENCE—Mining lease—Compensation for subsidence—Covenants running with the land - - - - - - 98
See COVENANT.

SUCCESSION DUTY—Entail—Propulsion of fee—"Acceleration" of succession - 166
See REVENUE. 6.

TAXES.
See under REVENUE.

TELEGRAPH—*Telephone—Postmaster-General—Monopoly—Private Lines—Telegraph Act*, 1869 (32 & 33 *Vict. c.* 73), *s.* 5.
Private telegraph or telephone lines of the A to A class, such as lines from a merchant's office to his private house, or from a head to a branch office, fall within s. 5 of the Telegraph Act, 1869, and are therefore excepted from the Postmaster-General's monopoly, but private lines of the A to B class, namely, lines connecting two or more separate and independent persons or business, are not within the exception.
Unlicensed electric signals (where no telephone is used) of the kind described in the second schedule to the special case are not excepted from the Postmaster-General's monopoly.
Decision of the Court of Appeal, [1908] 2 Ch. 172, reversed, and decision of Swinfen Eady J., [1907] 1 Ch. 621, restored. POSTMASTER-GENERAL *v.* NATIONAL TELEPHONE COMPANY, LIMITED - - - - - **H. L. (E.)** 269

TELEPHONE.
See under TELEGRAPH.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TENANT FOR LIFE—Will—Institution of heirs in specified proportions—Period of distribution - - - - 347
See PRIVY COUNCIL APPEALS. 11.

TIME—Railway company—Expiration of time—Company in lawful possession of land—Power to construct railway - 445
See RAILWAY. 3.

TORT—Master and servant—Breach of contract—Wrongful dismissal — Damages 488
See MASTER AND SERVANT. 1.

TRADE—Restraint of—Leases of machines for shoe manufacture — Restrictive condition as to user - - - - 330
See PRIVY COUNCIL APPEALS. 10.

—— Restriction on trade—Wrongful dismissal —Repudiation - - - - 118
See MASTER AND SERVANT. 2.

TRADE UNION—*Workman—Interference with Employment—Inducing Dismissal by Threats—"Trade Dispute"—"Contemplation or furtherance of a Trade Dispute"—Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3 ; *s.* 5, *sub-s.* 3.

In an action for damages for inducing the plaintiff's employers to dismiss him, by threats that otherwise the union men would cease working, the defence was that the acts (if any) of the defendant were not actionable as provided by s. 3 of the Trade Disputes Act, 1906. The jury found that there was no trade dispute existing or contemplated by the men, and that the defendant's threats were uttered in order to compel the plaintiff to pay a union fine and to punish him for not paying it and to prevent him from getting or retaining employment, and they gave the plaintiff damages :—

Held, that there was as a matter of fact evidence to justify the findings of the jury.

Decision of the Court of Appeal reversed and decision of Channell and Sutton JJ., [1908] 2 K. B. 844, 848, restored upon the above ground.

Observations on the words "contemplation or furtherance of a trade dispute" in s. 3 of the Trade Disputes Act, 1906. CONWAY (PAUPER) *v.* WADE - - - - - H. L. (E.) 506

TRADER—Carriers' lien—Goods on land in tenancy of trader—Detainer of goods 109
See BILL OF SALE.

TRAMROAD—General district rate—Assessment - - - - - - - 264
See RAILWAY. 5.

TRESPASSER—Infant—Railway company—Defective fence—Negligence—Turntable—Invitation to danger - - 229
See RAILWAY. 2.

TURNTABLE—Railway company—Defective fence—Negligence—Infant trespasser —Invitation to danger - - 229
See RAILWAY. 2.

UNDERLEASE—Covenant running with the land—Covenant by underlessor with underlessee to perform covenants of head lease—Collateral covenant - 72
See LANDLORD AND TENANT.

UNION—Poor Law.
See under POOR LAW.

—— Trade union.
See under TRADE UNION.

UNION ASSESSMENT COMMITTEE AMENDMENT ACT, 1864 - - - 247
See RATES. 1.

UNIVERSITIES ELECTIONS AMENDMENT (SCOTLAND) ACT, 1881 - - 147
See SCOTTISH LAW. 2.

UNIVERSITIES (SCOTLAND) ACT, 1889 - 147
See SCOTTISH LAW. 2.

VENDOR AND PURCHASER—Deposit by purchaser to guarantee fulfilment of contract—Default by purchaser or his assignee—Action to recover deposit dismissed - - - - - 576
See PRIVY COUNCIL APPEALS. 6.

WAY, RIGHT OF.—Admissibility of railway map by the Appellate Court - 361
See PRIVY COUNCIL APPEALS. 3.

WEST INDIA DOCKS—Lighter—Exemption from dock rates - - - - 15
See SHIPPING. 3.

WILL — *Perpetuity — Executory Limitation — Contingency—Remoteness—Construction of Will.*

A testator by will devised realty to his two sons as tenants in common in fee simple with a direction in a codicil to his sons and their heirs to make to each of his daughters for life "and afterwards to and amongst the children of each and their heirs" certain payments out of the royalties or out of the dead rent payable out of the coal under a specified farm and any other coal under any other land of the testator's when worked or let :—

Held, that upon the true construction of the codicil the testator intended to create executory limitations in land to arise at some future and indefinite period on a contingency which might or might not happen, and that the direction was void for remoteness so far as related to the testator's grandchildren.

Decision of Court of Appeal (not reported) affirmed.

London and South Western Ry. Co. v. *Gomm*, (1882) 20 Ch. D. 562, 580, approved upon this point. EDWARDS *v.* EDWARDS - H. L. (E.) 275

—— Accumulations of income during minority of donee — Testator's children to take equal shares in the residue at majority. 570
See PRIVY COUNCIL APPEALS. 8.

—— Distribution, Period of — Codicil — Construction - - - - - 210
See PRIVY COUNCIL APPEALS. 18.

—— Distribution, Period of — Institution of heirs in specified proportions—Tenant for life—Other proportions in certain assets sold during the life tenancy - 347
See PRIVY COUNCIL APPEALS. 11.

—— Power of appointment.
See under POWER OF APPOINTMENT.

WILL—*continued.*

—— Residuary legatees — Destination of the subject of void gifts—Next of kin—Res judicata — Appeal from the Straits Settlements - - - - - - 615
See PRIVY COUNCIL APPEALS. 24.

—— Scottish law — Will — Reduction — Agent alleged to benefit under will prepared by him—Suspicion—Defect in attestation - - - - - - - 278
See SCOTTISH LAW. 4.

WOMEN — Parliament — Franchise — Right of women graduates to vote - - 147
See SCOTTISH LAW. 2.

WORDS—"Acceleration" - - - - 166
See REVENUE. 6.

—— "Bridge" - - - - - - - 253
See RAILWAY. 1.

WORDS—*continued.*

—— "Conditional purchaser" - - - 199
See PRIVY COUNCIL APPEALS. 16.

—— "Dependant" - - - - - - 433
See EMPLOYER AND WORKMAN. 3.

—— "Earnings (average weekly)" - - 435
See EMPLOYER AND WORKMAN. 1.

—— "Reasonably" - - - - - - 78
See RATES. 2.

—— "Sewers" - - - - - - - 438
See SEWERS.

—— "Trade dispute" - - - - 506
See TRADE UNION.

WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.

WORKMEN'S COMPENSATION.
See under EMPLOYER AND WORKMAN.

BIBL. LONDIN. UNIV.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

UL 17 JUL 1967